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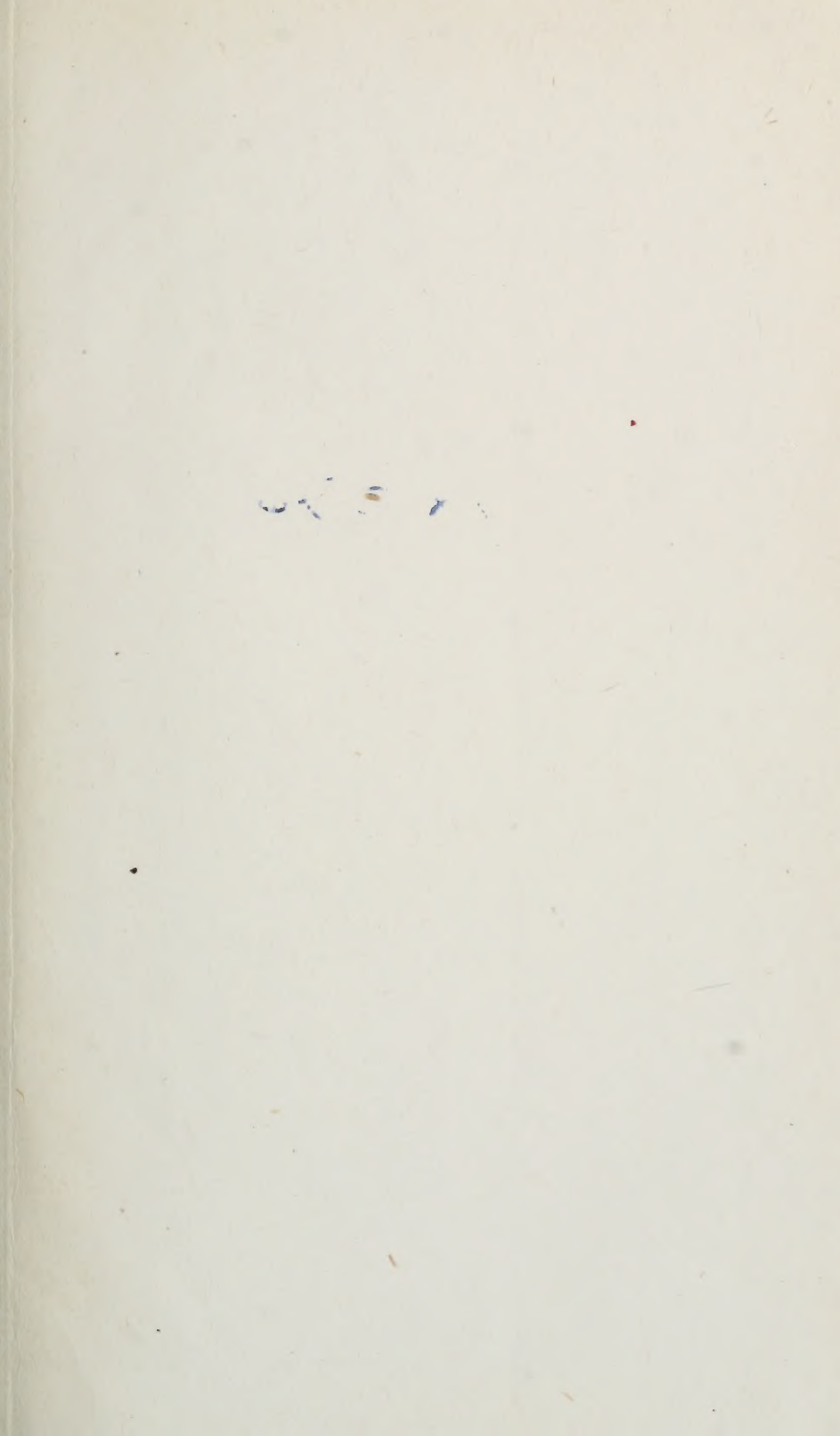
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No. 11075

25,243/

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WESTERN LOAN AND BUILDING COMPANY,  
a Corporation,

Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

Appellees.

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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**FILED**

AUG 17 1945

PAUL P. O'BRIEN,  
CLERK





No. 11075

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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WESTERN LOAN AND BUILDING COMPANY,  
a Corporation,

Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

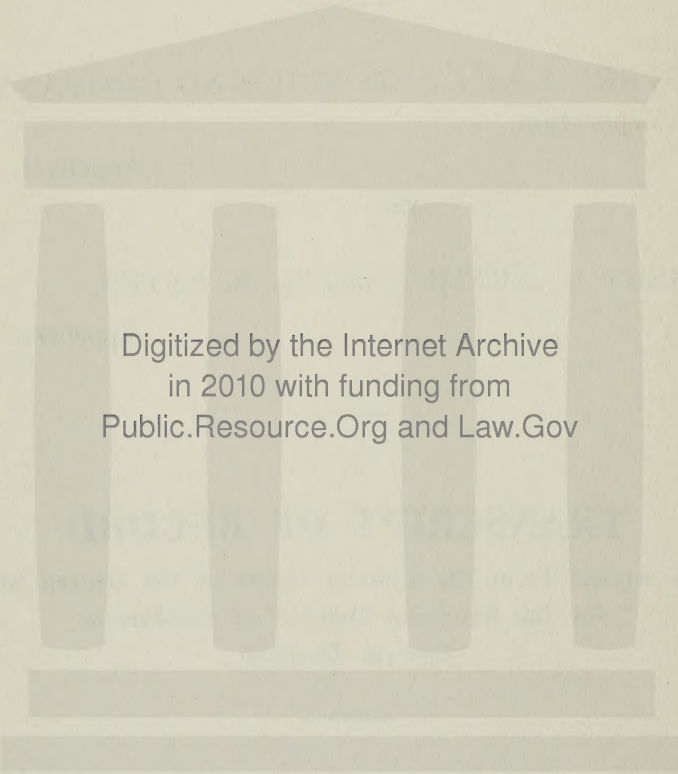
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

M. PERELLI-MINETTI

704 South Spring Street  
Los Angeles 14, Calif.

and

H. L. MULLINER

817 Continental Bank Building  
Salt Lake City 1, Utah

For Appellees:

FRED A. WILSON

408 Andreson Building  
San Bernardino, Calif. [1\*]

In the Superior Court of the State of California,  
in and for the County of San Bernardino

No. 51223

ALBERT C. ARTHUR AND H. B. ESTES,

Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY,  
a corporation,

### COMPLAINT

For cause of action against the above named defendant, plaintiffs allege:

#### I.

That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Utah.

#### II.

That on the 1st day of April, 1944, the said defendant had and received the sum of \$4,337.50 to and for the use and benefit of the plaintiffs.

#### III.

That on the 8th day of May, 1944, plaintiffs demanded the payment by defendant to plaintiffs of the said sum of \$4,337.50.

#### IV.

That the said defendant has not paid said sum of [2] \$4,337.50, or any part thereof, to plaintiffs, and that there



is now due, owing and unpaid from defendant to plaintiffs the said sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 8th day of May, 1944.

Wherefore, plaintiffs demand judgment against said defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 8th day of May, 1944, and for plaintiff's costs incurred herein.

FRED A. WILSON

Attorney for Plaintiffs.

[Verified.]

[Endorsed]: Filed Jun. 17, 1944, 9:35 a. m. Harry L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [3]

---

[Title of Superior Court and Cause.]

NOTICE OF MOTION AND PETITION FOR ORDER REMOVING CAUSE TO FEDERAL COURT

To the Plaintiffs. Albert C. Arthur and H. B. Estes; and to Fred A. Wilson, Their Attorney:

You will please take notice that on Monday, August 7, 1944, at the hour of 2:00 P. M. of said day, or as soon thereafter as counsel can be heard, in Department 1, which is the Law and Motion Department, of the above-entitled court, the above defendant will move and petition the above-entitled court for an order removing the above-en-

titled cause from the above-entitled court where it is presently pending to the United States District Court in and for the Southern District of California, Central Division.

This motion and petition will be based upon the Petition for Removal (a copy of which is attached hereto), this Notice of Motion, and a good and sufficient surety bond in the amount of \$1,000.00, (the original of which is being filed with the Clerk of the above-entitled court on this day, and a copy of which bond is attached here- [4] to), and upon the records and files in this action.

At said time and place defendant will move the court for approval of said Removal Bond and for such other relief as is authorized by law or as may be just or necessary in this matter.

Dated: July 22, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant-Petitioner

Received a copy of this notice, a copy of said surety bond on removal in the amount of \$1,000.00, and a copy of said petition for removal this 22d day of July, 1944. Fred A. Wilson, Attorney for Plaintiffs.

[Endorsed]: Filed Jul. 22, 1944, 10:28 a. m. Harry L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [5]

[Title of Superior Court and Cause.]

## PETITION FOR REMOVAL

To the Honorable Superior Court of the State of California, in and for the County of San Bernardino:

Comes now Western Loan and Building Company, the defendant in the above entitled cause, and files, this, its petition for the removal of said cause, and the whole thereof, from the aforesaid superior court of the State of California in and for the County of San Bernardino where it is now pending, to the United States District Court in and for the Southern District of California, Central Division.

Your petitioner respectfully shows to this Honorable Court:

1. That said action was commenced in this Court by the plaintiffs against your petitioner by the filing of a complaint with the Clerk of said Court on or about the 16th day of June, 1944. and Summons was thereafter issued and served on your petitioner, the defendant in said suit, in a county other than San Bernardino County, on the 26th day of June, 1944; that said defendant is required by the laws of the State of California [6] to answer or otherwise plead to the complaint of plaintiffs on file in said action on or before July 26, 1944.

2. That it appears from the said complaint, and said suit is, of a civil nature, of which said District Court of the United States, to which your petitioner desires the same removed, is by law given original jurisdiction, and



wherein and whereby plaintiffs seek to recover against your petitioner a judgment in the sum of \$4,337.50 as in said complaint alleged.

3. That the matter or amount in controversy in said suit at the time of the commencement thereof exceeded and now exceeds the sum of \$3,000.00 exclusive of interest and costs.

4. That the controversy in this action, and every issue of fact or law therein, is wholly between citizens of different states in this, that before and at the time of the commencement thereof the said plaintiffs, Albert C. Arthur and H. B. Estes, were and ever since have been and now still are citizens and resident of the State of California: that your petitioner, the defendant herein, Western Loan and Building Company is now and was at the time of the commencement of this action a corporation organized and existing under and by virtue of the laws of the State of Utah, and was before and at the time of the commencement of this action and still is, a citizen of the State of Utah and of no other state.

5. That your petitioner herewith presents and files a good and sufficient bond in accordance with the statute in such cases made and provided, conditioned as the law directs, that it will within 30 days from the filing of this petition, enter and file in the United States District Court in and for the Southern District of California, Central Division, a certified copy of the record in this action, and for the payment to plaintiffs of all costs that may be awarded by said Court if the said District Court shall hold that this suit was wrongfully or improperly removed.

6. That your petitioner has duly served notice upon [7] the attorney of record for plaintiffs that it would at the

time and place specified in said notice, present to this Court this petition and bond for the removal of this cause to the United States District Court in and for the Southern District of California, Central Division, the original of which Notice is hereby attached and made a part hereof.

Wherefore, your petitioner prays this said Court that it proceed no further herein, except to order the removal of said cause to said District Court of the United States in and for the Southern District, Central Division, pursuant to the statute in such cases made and provided; that it accept and approve the bond herewith presented and filed, and direct a transcript of the record to be made and certified as provided by law; and that it make such other and further orders as may be necessary and meet and proper in the premises.

WESTERN LOAN AND BUILDING COMPANY

By C. J. Sumner

Its Vice-President, General Manager and  
Attorney-in-Fact.

M. PERELLI-MINETTI

704 South Spring Street  
Los Angeles 14, California

H. L. MULLINER

817 Continental Bank Building  
Salt Lake City 1, Utah

By M. Perelli-Minetti

Attorneys for Petitioner.

[Verified.] [8]

[Endorsed]: Filed Jul. 22, 1944, 10:28 A. M. Harry  
L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [9]

[Title of Superior Court and Cause.]

PACIFIC INDEMNITY COMPANY

[Crest]

Los Angeles

San Francisco

Pacific Finance Bldg.

100 Sansome Street

BOND ON REMOVAL

Know All Men by These Presents: That Pacific Indemnity Company, a corporation organized and doing business under and by virtue of the laws of the State of California, and duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the said State, as surety, is held and firmly bound unto Albert C. Arthur and H. B. Estes, Plaintiffs in the above entitled action, their legal representatives, administrators or assigns, in the sum of One Thousand & No/100 - - - - Dollars (\$1000.00), lawful money of the United States of America, for the payment of which well and truly to be made, it binds itself, its successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The Condition of the above undertaking is such that, Whereas, Western Loan and Building Company a corporation, has applied by petition to the Superior Court of the State of California, in and for the County of San Bernardino, for the removal of a certain cause therein pending wherein Albert C. Arthur and H. B. Estes are the plaintiffs, and Western Loan and Building Company, a corpora-



tion, is the defendant, to the District Court of the United States of America for the Southern District of California, Central Division, for further proceedings, on the grounds in said petition set forth, and that all further proceedings in said Superior Court be stayed.

Now, Therefore, if the above named Defendant, Western Loan and Building Company, a corporation, shall within thirty (30) days from and after the date of the filing of said petition or the order of removal, enter in said District Court of the United States of America a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the District Court of the United States, if such court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, Sealed and Dated this 21st day of July, 1944.

[Seal]

PACIFIC INDEMNITY COMPANY

By J. W. Maynard, Jr.

Attorney-in-Fact.

Executed in Quadruplicate.

The Premium charged for this bond is \$10.00 per annum.

State of California,  
County of Los Angeles—ss.

On this 21st day of July in the year one thousand nine hundred and 44 before me, Atala M. Carter, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. W. Maynard, Jr., known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said J. W. Maynard, Jr. acknowledged to me that he subscribed the name of Pacific Indemnity Company, there-to as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

ATALA M. CARTER

Notary Public in and for Los Angeles County,  
State of California.

My Commission Expires May 28, 1946.

The Foregoing Bond is hereby approved as to form and sufficiency of surety, this 7th day of August, 1944.

BENJAMIN F. WARMER

Judge of the Superior Court.

[Endorsed]: Filed Jul. 22, 1944, 10:28 a. m. Harry L. Allison, Co. Clerk; by Helen E. Brooks, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [10]

[Title of Superior Court and Cause.]

ANSWER

Comes now the Western Loan and Building Company and for its answer to plaintiffs' complaint admits, denies and alleges as follows:

I.

Answering Paragraph II of plaintiffs' complaint denies that on April 1, 1944 or on any other date that this defendant had or received the sum of \$4,337.50 or any other sum to or for the use or benefit of plaintiffs.

II.

Answering Paragraph IV of plaintiffs' complaint denies that there is now due, owing or unpaid from defendant to plaintiffs the sum of \$4,337.50 or any other sum together with interest thereon at the rate of 7% per annum from May 8, 1944 or from any other date or without interest. [11]

Wherefore, defendant prays that plaintiffs take nothing by their complaint, and

That defendant have and recover its costs incurred herein.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Verified.]

[Endorsed]: Filed Jul. 26, 1944. 10:27 a. m. Harry L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [12]

[Title of Superior Court and Cause.]

DEMAND BY DEFENDANT WESTERN LOAN  
AND BUILDING COMPANY FOR BILL OF  
PARTICULARS

To Albert C. Arthur and H. B. Estes, plaintiffs, and to  
Fred A. Wilson, their attorney:

Demand Is Hereby Made Upon You to furnish to the defendant, Western Loan and Building Company, within 10 days, a bill of particulars setting forth the exact nature of the claim or cause of action alleged in plaintiffs' complaint and the alleged receipt by this defendant of the sum of \$4,337.50, or any other sum, for the use or benefit of plaintiffs giving as a part thereof the times that such moneys were received by this defendant, at whose instance or request such moneys were paid to this defendant, or at whose instance or request such moneys were to be held for the use or benefit of plaintiffs, whether such instances or requests were in writing or oral (and if written that you furnish copies of each such request), the purpose for which such sums of money were delivered to defendant for the [13] use or benefit of plaintiffs, to whom, when and where the money was delivered.

Dated: July 25, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Jul. 26, 1944, 10:27 a. m. Harry L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [14]



[Title of Superior Court and Cause.]

BILL OF PARTICULARS

To the defendant above named, and to M. Perelli-Minetti, Esq. and H. L. Mulliner, Esq., attorneys for said defendant:

You and each of you are hereby notified that pursuant to your demand therefor dated July 25th, 1944, the plaintiffs in the above entitled action do hereby present and deliver to you a Bill of Particulars setting forth the items of the account set forth in plaintiffs' complaint in the above entitled action, and do hereby set forth the nature of the cause of action alleged in said complaint, and do hereby allege and certify:

That the sum of \$4,337.50 was delivered by said plaintiffs to said defendant on April 1st, 1944, in the City of San Bernardino, California; that said sum was so delivered at the request of said defendant; that the defendant requested that said sum be delivered by plaintiffs to said defendant for the use and benefit of plaintiffs; and that said sum was so delivered by plaintiffs to defendant and was received by defendant, as aforesaid, as a deposit to apply on the purchase price of certain real [15] property in the event a contract for the purchase thereof was entered into between the plaintiffs and the said defendant.

Dated this 31st day of July, 1944.

ALBERT C. ARTHUR AND H. B. ESTES

By Albert C. Arthur

One of Said Plaintiffs.

FRED A. WILSON

Attorney for Said Plaintiffs.

[Verified.]

[Endorsed]: Filed Jul. 31, 1944, 4:40 p. m. Harry L. Allison, Co. Clerk; by Monte C. Smith, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [16]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF CAUSE TO  
FEDERAL COURT

Upon reading the petition of the Western Loan and Building Company, the defendant in the above-entitled action, and upon examination of the bond filed herein, and good and sufficient surety having been offered by the surety in the premises, and the same being by me, the Judge of the above-entitled Superior Court, duly accepted, and it further appearing and being proved that notice of said petition and bond for removal has been duly given to the plaintiff in this action prior to the filing of same, as required by law:

Now, Therefore, it is hereby ordered that no further proceedings be had in this cause in this Court, and the removal of the same to the United States District Court in and for the Southern District of California, Central Division, be, and the same is hereby, allowed and ordered, in accordance with the aforesaid petition and the statutes of the United States in such case made and provided, and the Clerk of this Court is hereby directed and ordered to deliver [17] to the said defendant, upon its demand and the payment by it of the said Clerk's legal fees, a certified copy of the record of all proceedings in this cause.

Dated: August 7, 1944.

BENJAMIN F. WARNER

Judge of the Superior Court in and for the County of  
San Bernardino

[Endorsed]: Filed Aug. 7, 1944, 4:03 p. m. Harry L. Allison, Co. Clerk; by Edith Campbell, Deputy.

[Endorsed]: Filed Aug. 17, 1944. [18]

State of California,  
County of San Bernardino—ss.

I, Harry L. Allison, County Clerk and Ex-Officio Clerk of the Superior Court of the State of California, in and for San Bernardino County, do hereby certify the foregoing to be a full, true and correct copy of the original Complaint, Summons, Notice of motion and petition for order removing cause to Federal Court, Petition for Removal, Bond on Removal, Answer, Demand by defendant Western Loan and Building Company for bill of particulars, Bill of Particulars, and Order for removal of cause to Federal Court in the action *Albert C. Arthur and H. B. Estes vs. Western Loan and Building Company*, a corporation, No. 51223 - - - - - on file in my office, and that I have fully compared said copy with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 11th day of August, 1944.

[Seal]

HARRY L. ALLISON

County Clerk and Ex-Officio Clerk of the Superior Court  
of the State of California, in and for the County of  
San Bernardino,

By Helen E. Brooks,  
Deputy.

Copy received

Doc. TS & C-1.

[Endorsed]: Filed Aug. 17, 1944. [19]

United States District Court  
Southern District of California

Central Division

No. 3815-PH Civil

ALBERT C. ARTHUR and H. B. ESTES,

Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY,  
a corporation,

Defendant.

NOTICE OF ORDER FOR REMOVAL OF CAUSE  
TO FEDERAL COURT

and

NOTICE OF FILING TRANSCRIPT OF RECORD  
IN THE UNITED STATES DISTRICT COURT

To Albert C. Arthur and H. B. Estes, plaintiffs and to  
Their Attorney, Fred A. Wilson:

You, and Each of You, Please Take Notice:

1. That on August 7, 1944 the Superior Court of the State of California in and for the County of San Bernardino in the action entitled "Albert C. Arthur and H. B. Estes, plaintiffs vs. Western Loan and Building Company, a corporation, defendant" (San Bernardino Superior Court action No. 51223), the Honorable Benjamin F. Warner, Judge presiding made its order for removal ordering that no further proceedings be had in said action in said Superior Court and removing the same to the



United States District Court in and for the Southern District of California, Central Division; and that attached hereto is a copy of said order which was duly entered thereafter on August 7, 1944.

2. That thereafter in accordance with the provisions of [20] said order for removal the clerk of said Superior Court and after payment to said clerk of all legal fees prepared a certified copy of record of all proceedings and transcript in said action consisting of: Complaint, Summons, Notice of Motion and Petition for Order Removing Cause to Federal Court, Petition for Removal, Bond on Removal, Answer, Demand by Defendant, Western Loan and Building Company for Bill of Particulars, Bill of Particulars, Order for Removal of Cause to Federal Court in action Albert C. Arthur and H. B. Estes vs. Western Loan and Building Company, a corporation, No. 51223.

You are further notified that said certified copy of record of all proceedings and transcript was filed in the United States District Court, Southern District of California, Central Division on August 17, 1944.

Dated: August 22, 1944.

M. PERELLI-MINETTI and H. L. MULLINER

By M. Perelli-Minetti

Attorneys for Defendant

[Note: Order for Removal of Cause to Federal Court attached hereto is the same as the one found at page 17 of the Certified Record so is not repeated at this point.]

[Endorsed]: Filed Aug. 23, 1944. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO AMEND  
ANSWER

To the Plaintiffs, Albert C. Arthur and H. B. Estes:  
and to Fred A. Wilson, Their Attorney:

You, and Each of You, Please Take Notice that the above entitled court sitting in Courtroom No. 4, the Honorable Peirson M. Hall, Judge presiding, will on Tuesday, December 26, 1944 at the hour of 10:00 o'clock A. M. or thereafter hear defendant's motion for leave to amend answer.

Defendant's motion will be based upon the files and records in this case.

Dated: December 15, 1944.

H. L. MULLINER and M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Dec. 15, 1944. [22]

---

[Minutes Tuesday, December 26, 1944.]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for hearing on motion of defendant for leave to amend answer, pursuant to notice filed December 15, 1944:

The Court states that in view of the fact that there is no appearance of counsel, and after an examination of the file, including the complaint, the pre-trial briefs, the original answer, and the pre-trial statements and proposed amended answer, it feels that Judge Hall would even permit such an amendment at the time of the trial so that the permission to file the amended answer is hereby granted. [23]

---

[Title of District Court and Cause.]

NOTICE ON MOTION TO FILE AMENDED  
ANSWER

To the Plaintiffs, Albert C. Arthur and H. B. Estes, and  
to Fred A. Wilson, Their Attorney:

You, and Each of You, are Hereby Notified that the motion of defendants to file an amended answer was granted by the above-entitled court, sitting in Courtroom No. 4 and that attached hereto and made a part hereof is a copy of the amended answer filed pursuant to the granting of said motion.

Dated: December 27, 1944.

H. L. MULLINER & M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Endorsed]: Filed Dec. 29, 1944. [24]

[Title of District Court and Cause.]

### AMENDED ANSWER

Comes now the Western Loan and Building Company and for its *answer the* plaintiffs' complaint admits, denies and alleges as follows:

#### I.

Answering Paragraph II of plaintiffs' complaint denies that on April 1, 1944 or on any other date that this defendant had or received the sum of \$4,337.50 or any other sum to or for the use or benefit of plaintiffs.

#### II.

Answering Paragraph III of plaintiffs' complaint defendant admits that plaintiffs demanded the sum of \$4,337.50, but in this respect defendant alleges that the demand was received by defendant about May 9, 1944 and that it was made in connection with the request by plaintiffs of the return to them of said sum previously paid by them and accepted by defendant as a deposit and [25] part payment on the purchase price of the sale by defendant to plaintiffs of an apartment house.

#### III.

Answering Paragraph IV of plaintiffs' complaint denies that there is now due, owing or unpaid from defendant to plaintiffs the sum of \$4,337.50 or any other sum together with interest thereon at the rate of 7% per annum from May 8, 1944 or from any other date or without interest.

As a Second, Separate and Further Defense, Defendant Alleges:



I.

That on April 1, 1944 and for many years prior thereto the defendant, Western Loan and Building Company, was the owner of and in possession of the Norman Manor and Norman Manor Annex Apartments located at 480-98 17th Street and 1745 E. Street, San Bernardino, California.

II.

That on April 1, 1944 the plaintiffs, Albert C. Arthur and H. B. Estes, offered in writing to purchase from defendant said apartments: that attached hereto marked Exhibit "A" and made a part hereof is a copy of said written offer to purchase.

III.

That at the same time that plaintiffs offered to purchase said apartments and as a deposit and a part payment plaintiffs paid to the defendant the sum of \$4,337.50.

IV.

That said offer to purchase provided, among other things, that it would "remain open and irrevocable to and including May 1st, 1944": that on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase and agreed to sell and did sell to the plaintiffs said apartments [26] upon the terms and conditions set forth in said offer to purchase.

V.

That at all times subsequent to April 24, 1944 defendant has been willing and able and the defendant is now will-

ing and able to comply in every respect with the terms and conditions set forth in the offer to purchase, but the plaintiffs have at all times since about May 9, 1944 failed and refused and still fail and refuse to carry out the terms of said sale.

Wherefore, defendant prays that plaintiffs take nothing by their complaint, and

That defendant have and recover its costs incurred herein.

H. L. MULLINER and M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Defendant

[Verified.]

[Note: Exhibit A attached hereto is the same as plaintiff's Exhibit No. 6, set forth at page 69.]

[Endorsed]: Filed Dec. 29, 1944. [27]

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[Title of District Court and Cause.]

### WAIVER OF JURY TRIAL

Come now the plaintiffs above named and waive a jury and a trial by jury in the above entitled cause.

Dated this 2nd day of January, 1945.

FRED A. WILSON

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 4, 1945. [28]

[Minutes: Thursday, January 11, 1945.]

Present: The Honorable: Peirson M. Hall, District Judge.

This cause coming on for further trial; Fred A. Wilson, Esq., appearing for the plaintiffs; M. Perelli-Minetti and H. L. Mulliner, Esqs., appearing for the defendant; H. P. Fursdon, Court Reporter, being present and reporting the proceedings:

Witness Sullivan is recalled and testifies further in behalf of the defendant, and Defendant's Exhibits G and H are offered and admitted into evidence, following which Defendant's Exhibits I and J are offered and marked for identification. Later, Defendant's Exhibit I for identification is ordered admitted into evidence.

Witness Carran is recalled and testifies further in behalf of the defendant and Defendant's Exhibit K is offered and admitted into evidence. The defendant rests.

Witness Estes is recalled in rebuttal in behalf of the plaintiffs.

Witness Arthur is recalled in rebuttal and testifies further.

At 11:55 A. M. court recesses to 1:30 P. M. Court reconvenes at 2 P. M.; all present as before.

Witness Arthur resumes the stand and testifies further on surrebuttal for the plaintiffs. The plaintiff rests.

Witness Carran is recalled and testifies on sur-rebuttal for the defendant. Witness Sullivan is recalled and testifies on sur-rebuttal for the defendant. The defendant rests.

Attorney Perelli-Minetti argues to the Court for the defendant. [29]

Attorney Wilson argues to the Court in behalf of the plaintiffs.

The Court orders judgment for the plaintiffs.

Attorney Mulliner moves to re-open the case for the purpose of the introduction of a letter and counsel for plaintiffs interposing no objection, Defendant's Exhibit I-1 is offered and admitted into evidence.

The Court after due consideration of the evidence orders judgment in favor of the plaintiffs, counsel for the plaintiffs to prepare formal Findings of Fact and Conclusions of Law, and Judgment pursuant thereto, and counsel for the defendant to have 10 days after service of copy of Findings to file objections thereto. [30]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred. A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.



### Findings of Fact

From the evidence introduced, the Court hereby finds:

(a) That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Utah;

(b) That on April 1st, 1944, and for many years prior [31] thereto the defendant was and still is the owner and in possession of the Norman Manor and Norman Manor Annex Apartments, located at 480-498 Seventeenth Street and 1745 "E" Street, in the City of San Bernardino, California;

(c) That on April 1st, 1944, the plaintiffs, in writing, offered to purchase said Apartments, including the furniture and furnishings thereof, from the defendant, a copy of which offer is marked Exhibit "A" and attached to defendant's amended answer herein;

(d) That contemporaneously with the delivery of said offer to defendant the plaintiffs deposited with the defendant the sum of \$4,337.50;

(e) That said offer provided that said sum so deposited should be retained by defendant if, after acceptance of said offer, the sale of said Apartments to plaintiffs was not completed by reason of any fault or failure of plaintiffs, or if said offer was withdrawn prior to May 1st, 1944;

(f) That said offer also provided that said offer should remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted;

(g) That plaintiffs on May 8th, 1944, by telegram and by letter withdrew and revoked said offer, and demanded return to them by defendant of said sum of \$4,337.50 so deposited by plaintiffs, as aforesaid;

(h) That the defendant on May 9th, 1944, received notice and had knowledge of the aforesaid withdrawal and revocation of said offer by plaintiffs, and of plaintiffs' demand for the return of said sum;

(i) That the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer;

(j) That the defendant has not returned said sum of [32] \$4,337.50, or any part thereof, to plaintiffs;

(k) That it is not true that said sum, or any part thereof, was paid by plaintiffs to defendant as part payment of the purchase price of said Apartments, or as payment in whole or in part for any property whatsoever;

(l) That it is not true that on or about April 28th, 1944, or at any other time while said offer remained open, the defendant verbally or otherwise accepted said offer, or agreed to sell or did sell to plaintiffs the said Apartments, or any property whatsoever;

(m) That it is not true that the defendant at any time prior to receiving notice and obtaining knowledge of the withdrawal and revocation of said offer, as aforesaid, has been willing and able to comply with the terms and conditions of said offer.

### Conclusions of Law

From the foregoing facts, the Court deduces the following Conclusions of Law:

(1) That on the 1st day of April, 1944, the said defendant had received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of the offer aforesaid;

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked said offer, and demanded return of said sum to plaintiffs;

(3) That defendant did not, prior to receiving notice and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer;

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs;

(5) That plaintiffs are entitled to judgment against [33] the defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent. per annum from the 9th day of May, 1944, and for plaintiffs' costs incurred herein.

Let judgment be entered accordingly.

Dated this 27 day of January, 1945.

PEIRSON M. HALL,

Judge. [34]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 27, 1945. [35]

[Title of District Court and Cause.]

### NOTICE OF MOTION

- 1) To vacate Findings of Fact and Conclusions of Law heretofore signed, and
- 2) of objections to plaintiffs' proposed Findings and Conclusions and Motion to Amend same

To Albert C. Arthur and H. B. Estes, Plaintiffs and to  
Fred A. Wilson, Esq., Their Attorney:

You Will Please Take Notice that on Monday, February 19, 1945 at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in Courtroom No. 4 of the above entitled court, the Honorable Peirson M. Hall, Judge Presiding, located in the Post Office and Court House Building in the City of Los Angeles, California, that the defendant, Western Loan and Building Company, will move the court:

(1) To vacate the Findings of Fact and Conclusions of Law heretofore signed and that the court make its order amending Findings of Fact and Conclusions of Law proposed by plaintiffs.

The motion to vacate the Findings of Fact and Conclusions of Law heretofore signed will be based upon the ground that the above entitled court granted to defendant, all as more particularly [36] shown in its Minute Order made and entered January 11, 1945 in Minute Book 44 at Pages 191 and 192, the right to file objections thereto within ten days after service of a copy of the same upon defendant and that through inadvertence the above entitled court signed the Findings prior to the expiration of the ten day period.



(2) The motion to amend the Findings of Fact and Conclusions of Law will be based upon the ground that the Findings of Fact, as proposed by plaintiffs, fail to contain Findings of Fact upon the three material issues of fact which were joined. These three material issues follow:

- (A) Did Mr. Carron, in a telephone conversation on April 24, 1944, state to Mr. Arthur that the deal had been approved by the Salt Lake office of defendant company and then arrange for taking the inventory of the furnishings?
- (B) Did Mr. Sullivan, by telephone, May 8, 1944, inform Mr. Arthur of the acceptance of the deal by the defendant and of the receipt by Mr. Sullivan of the papers to close the deal, and was his call before or after the receipt by the company of plaintiffs' night telegrams and letters withdrawing their offer?
- (C) Considering the offer and the previous transactions with plaintiffs and the escrow instructions and the statement in plaintiffs' bill of particulars concerning the \$4,337.50 deposit, would this have been applied as a payment if the deal had been closed, and was it so intended by the parties hereto?

Defendant respectfully contends that it is entitled to findings on these material issues of fact. Defendant also respectfully tenders proposed findings covering these issues, without [37] waiving its right to object to the conclusions or the decision of the Court herein.

By reason of plaintiffs' failure to include in their proposed Findings of Fact findings upon the foregoing is-

sues, defendant will move for an amendment to the proposed findings submitted by plaintiffs in the following respects:

(a) In subdivision "a" of plaintiffs' proposed findings by deleting the word "corporation" appearing at line 29, page 1 and substituting in lieu thereof "Building and Loan Association" and by adding to said subdivision "a" after the word "Utah" at line 31, page 1 the following words "and authorized to transact business in California".

(b) By omitting the findings contained in subdivision "b" beginning at line 32, page 1 through line 4, page 2 of plaintiffs' proposed findings.

(c) By reason of the deletion of subdivision "b", subdivision "c" appearing at lines 5 through 9, page 2 of plaintiffs' proposed findings has been designated subdivision "b" in the findings attached hereto.

(d) By reason of the deletion of subdivision "b", subdivision "d" appearing at lines 10 through 12, page 2 of plaintiffs' proposed findings has been designated subdivision "c" in the findings attached hereto.

(e) In subdivision "e" of plaintiffs' proposed findings by inserting after the word "defendant" appearing at line 14, page 2 the following words "as liquidated damages as therein recited". This subdivision, as amended, has been designated subdivision "d" in the findings attached hereto.

(f) In subdivision "f" of plaintiffs' proposed findings by adding after the word "accepted" appearing at line 20, page 2 the words "and that the closing date of the sale

was May 15, 1944". This subdivision, as amended, has been designated subdivision "e" in the [38] findings attached hereto.

(g) By deleting subdivision "g" appearing at lines 21 through 24, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "g" designated subdivision "f" set out in the proposed findings attached hereto beginning at line 19, page 2 through line 7, page 3.

(h) By deleting subdivision "h" appearing at lines 25 through 28, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "h" designated subdivision "g" set out in the proposed findings attached hereto beginning at line 8, page 2 through line 15, page 2.

(i) By deleting subdivision "i" appearing at lines 29 through 31, page 2 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision "i" designated subdivision "h" set out in the proposed findings attached hereto beginning at line 16, page 3 through line 5, page 4.

(j) By reason of the deletion of subdivision "b", subdivision "j" appearing at line 32, page 2 through line 1, page 3 of plaintiffs' proposed findings has been designated subdivision "i" in the findings attached hereto.

(k) By deleting subdivision "k" appearing at lines 2 through 5, page 3 of plaintiffs' proposed findings and by substituting in lieu thereof an entirely new subdivision

“k” designated subdivision “j” set out in the proposed findings attached hereto beginning at line 8, page 4 through line 14, page 4.

(l) By deleting subdivision “l” appearing at lines 6 through 10, page 3 of plaintiffs’ proposed findings and by substituting in lieu thereof an entirely new subdivision “l” designated subdivision “k” set out in the proposed findings attached hereto beginning at line 15, page 4 through line 19, page 4.

(m) By deleting subdivision “m” appearing at lines 11 through 15, page 3 of plaintiffs’ proposed findings and by substituting in lieu thereof an entirely new subdivision “m” designated subdivision “l” set out in the proposed findings attached hereto beginning at line 20, page 4 through line 22, page 4.

(n) That in the third division of the Conclusions of Law after the word “offer” at line 29, page 3 of plaintiffs’ proposed findings there be added the words “as required by law”.

Said motion will also be made and based upon this notice and upon the pleadings, papers, records, and files in this action.

Dated this 2nd day of February, 1945.

H. L. MULLINER & M. PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Defendant [40]



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.

### Findings of Fact

From the evidence introduced, the Court hereby finds:

(a) That the defendant, Western Loan and Building Company, is and at all times herein mentioned was a Building and Loan Association organized and existing under and by virtue of the laws of the State of Utah, and authorized to transact business in California. [41]

(b) That on April 1st, 1944, the plaintiffs, in writing, offered to purchase said Apartments, including the furniture and furnishings thereof, from the defendant, a copy of which offer is marked Exhibit "A" and attached to defendant's amended answer herein;

(c) That contemporaneously with the delivery of said offer to defendant the plaintiffs deposited with the defendant the sum of \$4,337.50;

(d) That said offer provided that said sum so deposited should be retained by defendant as liquidated damages as

therein recited if, after acceptance of said offer, the sale of said Apartments to plaintiffs was not completed by reason of any fault or failure of plaintiffs, or if said offer was withdrawn prior to May 1st, 1944;

(c) That said offer also provided that said offer should remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted, and that the closing date of the sale was May 15, 1944;

(f) About April 18, 1944, appraisal of the property involved was made by an appraiser, approved by the building and loan commissioner of the State of California, and on April 21, 1944, approval of the sale by a California director of the company, Mr. Scudder, was addressed to the Salt Lake office of the company.

By letter dated April 22, 1944, C. J. Sumner, then acting as General Manager and Executive Vice-President of defendant company, addressed to P. E. Sullivan, Sales Manager of defendant company for the State of California, authorizing approval of the sale (defendant's Exhibit "I"). This letter was received at the Los Angeles office of defendant company April 24, 1944. On that date, and while Mr. Sullivan was at that office, Mr. James Carron, the Sales Manager of defendant company at the Los Angeles office, called Albert C. Arthur, one of the plaintiffs, and told him on the [42] telephone that the defendant had approved the sale, and he then arranged with Mr. Arthur for the taking of an inventory of the furnishings in the said property commencing the following day (Ex. "F").

The inventory was taken in the property April 25 and 26, 1944, the two plaintiffs and Mr. Carron participating. The sheets listing the individual items so inventoried were signed by the plaintiffs, but not by anyone representing defendant (Ex. "C").

(g) At the time of taking the inventory, it was stated to plaintiffs by Mr. Carron that the inventory would have to be recapped and totaled and sent to the Salt Lake office of defendant company, and that the papers to close the transaction would come from the Salt Lake office.

The inventory was recapped and typed (Ex. "D") at the Los Angeles office of defendant company and sent to the Salt Lake office.

(h) The deed, trust deed, note, bill of sale, and chattel mortgage required to close the transaction, executed in so far as required by defendant, were forwarded by its Salt Lake office to its Los Angeles office May 5, 1944 and received there Monday morning May 8, 1944. On said date Mr. Sullivan called Mr. Arthur, one of the plaintiffs, and stated to him that the papers had been received to close the transaction, and that defendant was ready to close. Mr. Arthur then informed Mr. Sullivan that plaintiffs had decided not to go through with the deal.

Under date of May 8, 1944, plaintiffs caused to be prepared and wired to defendant's Salt Lake and to its Los Angeles office, by Western Union, night letters, stating that the offer to purchase was withdrawn and that they demanded return of the \$4,337.50 here involved. The wire to Los Angeles was received there and telephoned by the

telegraph company to Mr. Sullivan the morning of May 9, 1944 at 9:21 a. m., and delivered later by mail. The wire to Salt Lake was received May 9, 1944. [43]

Letters to each of said offices of defendant company were also prepared under date of May 8, 1944 and forwarded. The letter addressed to the Los Angeles office was received May 10, 1944 and the letter to the Salt Lake office was received on May 11, 1944.

(i) That the defendant has not returned said sum of \$4,337.50, or any part thereof, to plaintiffs.

(j) From the evidence it appears, and the Court finds from the offer and from the previous transactions with the plaintiff Estes and from the allegation in plaintiff's bill of particulars and the escrow instructions, that if the transaction had been closed, the \$4,337.50 would have been applied upon the purchase price contained in the offer, and that this was so intended by the parties hereto.

(k) That the foregoing Findings of Fact do not constitute an acceptance by defendant of the offer by plaintiffs in a legal, proper or authorized manner, or so as to constitute a binding contract between the parties hereto, or so as to entitle defendant to retain the sum of \$4,337.50 here involved.

(l) That defendant was, on or about May 8, 1944, willing to close said transaction, and has ever since been ready and willing to complete the same.



### Conclusions of Law

From the foregoing facts, the Court deduces the following Conclusions of Law:

(1) That on the 1st day of April, 1944, the said defendant had received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of the offer aforesaid.

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked said offer, and demanded return of said sum to plaintiffs.

(3) That defendant did not, prior to receiving notice [44] and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer as required by law.

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs.

(5) That plaintiffs are entitled to judgment against the defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent per annum from the 9th day of May, 1944, and for plaintiffs' costs incurred herein.

Let judgment be entered accordingly.

Dated this ..... day of ....., 1945.

.....  
Judge

[Endorsed]: Filed Feb. 2, 1945. [45]

[Title of District Court and Cause.]

NOTICE OF INTENTION OF THE DEFENDANT  
TO MOVE FOR NEW TRIAL

To the Clerk of the Above-Named Court; to Albert C.  
Arthur and H. B. Estes, Plaintiffs and to Fred A.  
Wilson, Esq., Their Attorney:

You, and Each of You, Will Please Take Notice that on Monday, February 17, 1945 at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in Courtroom No. 4 of the above entitled court, the Honorable Peirson M. Hall, Judge Presiding, located in the Post Office and Court House Building in the City of Los Angeles, California, that the defendant, Western Loan and Building Company, intends to move the court to vacate and set aside the judgment of the court heretofore rendered in favor of the plaintiffs and against the defendant, Western Loan and Building Company, in the above entitled matter, and to grant a new trial on said action on the following grounds:

1. Insufficiency of the evidence to justify the decision, [46] and that the decision is against the law.
2. Error in law occurring at the trial.

Said motion will be made upon the minutes of the court, papers and files in this action, the judgments rendered, and this notice of motion.

Dated: February 2, 1945.

H. L. MULLINER & M. PERELLI-MINETTI  
By M. PERELLI-MINETTI  
Attorneys for Defendant

### Points and Authorities

1. The evidence disclosed without any direct conflict that the plaintiffs were advised on two separate occasions by telephone that the defendant, Western Loan and Building Company, through its Salt Lake office, had accepted the offer to purchase. The first occasion occurred on April 24, 1944 when Mr. Carron telephoned from Los Angeles to Mr. Arthur at San Bernardino. The second occasion occurred on May 8, 1944 when Mr. Sullivan telephoned from Los Angeles to Mr. Arthur at San Bernardino. Both of these telephone calls took place before defendant had received any information of any kind that the plaintiffs, or either of the plaintiffs, had revoked or withdrawn or attempted to revoke or withdraw the written offer to purchase.

2. Either of the verbal acceptances so transmitted by Messrs. Carron and Sullivan to plaintiffs was sufficient under the law to transform the written offer to purchase into a binding contract.

*Laffey v. Kaufman*, 134 Cal. 391 (66 Pac. 494)

*Walbridge v. Richards*, 212 Cal. 408 (298 Pac. 985)

*Harper v. Goldschmidt*, 156 Cal. 245 (104 Pac. 451) [47]

3. The offer to purchase did not expire May 1, 1944. The offer to purchase was "irrevocable to and including May 1st 1944" and the \$4,337.50 was to be retained by defendant as liquidated damages if withdrawn prior to May 1, 1944. The offer to purchase remained open, although no longer irrevocable, until May 15, 1944. Such

is the unambiguous language of the offer and such is the interpretation placed upon the offer by the plaintiffs.

4. Assuming (but not conceding) that the offer to purchase was originally phrased and intended to expire on May 1, 1944, nevertheless plaintiffs under the circumstances in this case and by their acts waived the time limit. This waiver consisted, in part, of the repeated requests by each of the plaintiffs to the defendant to hurry along the acceptance; the taking of the inventory of furniture, furnishings and equipment in San Bernardino just prior to May 1, 1944—or to be exact on the 25th and 26th of April, which was participated in by each of the plaintiffs and which in turn necessitated a recapping of all of the items contained in the inventory in defendant's Los Angeles office and then a forwarding of the recapping to Salt Lake to permit Salt Lake to draft and execute the deed, trust deed, bill of sale, chattel mortgage and other instruments and the mailing of those instruments to Los Angeles for delivery to plaintiffs in San Bernardino and all of this activity at a time when plaintiffs had knowledge that Mr. Carron (in charge of the Los Angeles sales office of defendant) was leaving the defendant's employ as of April 30, 1944 (Sunday).

Williston on Contracts, Rv'd. Ed., Vol. 1, Sec. 53, page 151 in the following language recognizes this to be the rule:

“ . . . Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the [48] terms of his offer. Any such manifest action of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.”

5. The revocation or withdrawal by plaintiffs of their offer, or their attempts in that direction, were ineffectual until actual notice thereof was received by defendant.

125 ALR 989, 990

200 Cal. 222

The telegrams and letters of revocation from plaintiffs were received by defendant May 9, 1944. They cannot therefore prevail against the verbal acceptances communicated by Mr. Carron on April 24, 1944 and by Mr. Sullivan May 8, 1944.

Dated this 2nd day of February, 1945.

H. L. MULLINER & M. PERELLI-MINETTI  
Attorneys for Defendant

[Endorsed]: Filed Feb. 2, 1945. [49]

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[Minutes: Monday, February 19, 1945.]

Present: The Honorable: Peirson M. Hall, District Judge.

This cause coming on for hearing on motion of the defendant to vacate Findings of Fact and Conclusions of Law, heretofore signed by the Court, and hearing on objections to plaintiffs' proposed Findings of Fact and Conclusions of Law, and motion to amend same, pursuant to notice filed February 2, 1945; Fred A. Wilson, Esq., appearing for the plaintiffs; M. Perelli-Minetti, Esq., appearing for the defendant; John Q. Bybee, Court Reporter, being present and reporting the proceedings: the case is called at 10 A. M. and continued to 2 P. M. Court reconvenes herein at 2 P. M.; all present as before.



The Court signs judgment pursuant to Findings dated and signed as of January 27, 1945, and said judgment is dated as of January 27, 1945, which is ordered filed and entered in the Civil Order Book.

Attorney Perelli-Minetti now argues in support of motion to vacate Findings of Fact and Conclusions of Law, and motion for a new trial. Attorney Wilson argues in opposition.

The Court orders said motions to vacate Findings and for a new trial denied, and signs Judgment pursuant to findings and orders same filed and entered in the Civil Order Book. [50]

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United States District Court  
Southern District of California  
Central Division  
No. 3815-PH-Civil

ALBERT C. ARTHUR and H. B. ESTES,  
Plaintiffs,

vs.

WESTERN LOAN AND BUILDING COMPANY, a  
corporation,  
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 10th day of January, 1945, the plaintiffs appearing in person and by their attorney, Fred. A. Wilson, Esq., and the defendant appearing by its attorneys, H. L. Mulliner, Esq. and M. Perelli-Minetti, Esq.; whereupon evidence was duly introduced by and on behalf of the respective parties and the cause submitted to the Court for its decision and judgment.

Thereafter the Court duly made and entered its Findings of Fact and Conclusions of Law:

Now, Therefore, in Accordance With the Law and the Evidence and the Decision Aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

(1) That on the 1st day of April, 1944, the said defendant had and received the sum of \$4,337.50 to and for the use and benefit of plaintiffs, subject to the provisions of [51] the offer referred to in said decision;

(2) That on May 8th, 1944, the plaintiffs withdrew and revoked the said offer referred to in said decision and demanded the return of said sum to plaintiffs;

(3) That defendant did not, prior to receiving notice and obtaining knowledge of such withdrawal and revocation thereof by plaintiffs, accept said offer;

(4) That defendant has not returned the said sum, or any portion thereof, to plaintiffs;

(5) That plaintiffs have and recover judgment against defendant for the sum of \$4,337.50, together with interest thereon at the rate of seven per cent. per annum from the 9th day of May, 1944, and for plaintiffs' costs and disbursements herein, duly taxed in the sum of \$.....

Dated this 27 day of January, 1945.

PEIRSON M. HALL

Judge.

Judgment entered Feb. 19, 1945. Docketed Feb. 19, 1945, C. O. Book 30, page 778. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Feb. 19, 1945. [52]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER DENYING  
MOTION FOR NEW TRIAL.

To the defendant above named, and to M. Perelli-Minetti,  
Esq. and H. L. Mulliner, Esq., attorneys for said de-  
fendant:

You and each of you will please take notice that on the  
19th day of February, 1945, the above entitled District  
Court duly made and entered its order denying the motion  
of the defendant above named for a new trial of said  
cause.

Dated this 24th day of February, 1945.

FRED A. WILSON  
Attorney for Plaintiffs.

[Endorsed]: Filed Feb. 26, 1945. [53]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT

To the Clerk of the Above Entitled Court and to Albert  
C. Arthur and H. B. Estes, plaintiffs and to Fred A.  
Wilson, their attorney:

Notice Is Hereby Given that the Western Loan and  
Building Company, a corporation, the defendant above  
named, hereby appeals to the United States Circuit Court

of Appeals for the Ninth Circuit from the following judgment and orders:

1. The judgment filed, entered and docketed on February 19, 1945 in Civil Orders Book 30, page 778 in favor of plaintiffs and against defendant.

2. The order of the above entitled court made on February 19, 1945 and duly entered on February 19, 1945 in Volume 44 at pages 896 and 897 of the Minute Book denying the motion of the defendant for a new trial, and

3. The order of the above entitled court made on [54] February 19, 1945 and duly entered on February 19, 1945 in Volume 44 at pages 896 and 897 of the Minute Book denying the motions of the defendant entitled "Notice of Motion" (1) To Vacate Findings of Fact and Conclusions of Law heretofore signed, and (2) of Objections to Plaintiffs' Proposed Findings and Conclusions and Motion to Amend same.

H. L. MULLINER & M. PERELLI-MINETTI

By M. PERELLI-MINETTI

Attorneys for Appellant, Western Loan and Building Company [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed & mailed copy to Fred A. Wilson, atty. for plaintiffs, May 18, 1945. [56]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Western Loan and Building Company, a Corporation, Defendant in the above entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment in the above matter entered February 19, 1945, in favor of the Plaintiffs and against the Defendant.

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Co., a Corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Co. has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be affixed hereto, this 18th day of May, 1945.

NATIONAL AUTOMOBILE AND CASUALTY  
INSURANCE CO.

(Seal)

By LLOYD H. JOHNSTON,  
Attorney-in-Fact



Examined and Recommended for Approval as provided in Rule 13.

M. PERELLI-MINETTI

Attorney.

State of California,

County of Los Angeles—ss.

On this 18th day of May, in the year 1945, before me, Ruth E. Harris a Notary Public in and for said County and State, personally appeared Lloyd H. Johnston, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as principal, and his own name as Attorney-in-Fact.

(Seal)

RUTH E. HARRIS

Notary Public in and for Said County and State.

[Endorsed]: Filed May 18, 1945. [57]

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[Title of District Court and Cause.]

ORDER TRANSFERRING ORIGINAL PAPERS  
AND EXHIBITS TO THE CLERK OF THE  
UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT

Upon reading the affidavit of M. Perelli-Minetti, one of the attorneys for the appellant, Western Loan and Building Company, and good cause appearing therefor:

It Is Hereby Ordered that the clerk of the above entitled court is hereby directed to transmit forthwith to the

clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, all original papers and exhibits in the above entitled action, so that the same may be used for printing the record on appeal in this action and that thereafter and after the determination of the appeal in this action that the same be returned to the clerk of this court.

Dated: This 13 day of June, 1945.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Jun. 13, 1945. [64]

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[Title of District Court and Cause.]

# CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64 contain full, true and correct copies of Complaint; Notice of Motion and Petition for Order Removing Cause to Federal Court; Petition for Removal; Bond on Removal; Answer; Demand by Defendant for Bill of Particulars; Bill of Particulars; Order for Removal of Cause to Federal Court; Certificate of Clerk of Superior Court; Notice of Order for Removal of Cause to Federal Court and Notice of Filing Transcript of Record in the United States District Court; Notice of Motion for Leave to Amend Answer; Minute

Order Entered December 26, 1944; Notice of Motion to File Amended Answer; Amended Answer, except Exhibit A; Waiver of Jury Trial; Minute Order Entered January 11, 1945; Findings of Fact and Conclusions of Law; Notice of Motion to Vacate Findings of Fact and Conclusions of Law heretofore signed, and of Objections to Plaintiffs' Proposed Findings and Conclusions and Motion to Amend same; Notice of Intention of the Defendant to Move for New Trial; Minute Order Entered February 19, 1945; Judgment; Notice of Entry of Order Denying Motion for New Trial; Notice of Appeal; Bond on Appeal; Designation of Record on Appeal; Affidavit of M. Perelli-Minetti in Support of Order Transferring Original Papers and Exhibits and Order Transferring Original Papers and Exhibits to the Circuit Court of Appeals which, together with copy of Reporter's Transcript and Original Plaintiffs' Exhibits 1 to 6 inclusive and Original Defendant's Exhibits A to K inclusive constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14 day of June, 1945.

EDMUND L. SMITH,

(Seal)

Clerk

By THEODORE HOCKE

Chief Deputy

[Title of District Court and Cause.]

Hon. Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF TESTIMONY  
AND PROCEEDINGS OF TRIAL

Los Angeles, California, Wednesday, January 10, 1945.  
10 a. m.

The Clerk:    Albert C. Arthur, et al., v. Western Loan  
& Building Company, for trial.

Mr. Perelli-Minetti:    At this time, your Honor, I would  
like to move for admission to this court for the purpose of  
trial of this case Mr. H. L. Mulliner, of Salt Lake City,  
general counsel of this company, a practicing attorney of  
Salt Lake City, admitted to practice in the Ninth Circuit.

The Court:    Do you vouch for his character?

Mr. Perelli-Minetti:    I do.

The Court:    Motion granted. Are you ready to  
proceed?

Mr. Wilson:    Yes, your Honor.

H. B. ESTES,

called as a witness in behalf of the plaintiffs, being first  
duly sworn, testified as follows:

The Clerk:    Will you state your name, please.

A.    H. B. Estes.

The Clerk:    And your address?

A.    386 Highland Avenue, San Bernardino.

Direct Examination

Q.    By Mr. Wilson:    Mr. Estes, you are one of the  
plaintiffs here?                    A.    Yes, sir.

Q.    What is your business?

A.    Real estate business. [2\*]

(Testimony of H. B. Estes)

Q. How long have you been a real estate broker?

A. About 15 years.

Mr. Wilson: If your Honor please, during the pre-trial we had occasion to use some papers. Are we to observe the same numbering now that we used then?

The Court: Were they numbered then? Do you have your exhibits that you propose to offer?

Mr. Wilson: Yes.

The Court: Just hand them to the Clerk and he will mark them all for identification numerically now. Will you describe them as you hand them to the Clerk?

Mr. Wilson: 1 is the purchaser's copy of the Offer to Purchase.

2 are two telegrams of revocation dated May 8th.

3 are two letters of revocation of the same date.

4 is a prospectus or listing dated January, 1942.

5 is a similar document dated January, 1944.

6 is the broker's copy of the Offer to Purchase.

Q. By Mr. Wilson: Referring to Exhibit 1 for Identification, does it bear your signature? A. Yes.

Q. And the signature of your co-plaintiff, Albert C. Arthur? A. Yes, sir.

Mr. Wilson: We will offer this exhibit, your Honor, as Exhibit 1. [3]

Mr. Mulliner: No objection.

The Court: Admitted.

[Note: Exhibit No. 1 is the same as Exhibit No. 6, except for initials to portion stamped on face of exhibit. Exhibit No. 6 will be found at p. 69.]

Mr. Wilson: Mr. Mulliner, do you have the originals of these?



(Testimony of H. B. Estes)

(The papers were produced by Mr. Mulliner.)

Mr. Wilson: Your Honor, as Exhibit 2 I offer in evidence the two documents, being the telegrams of May 8th, which comprise carbon copies, and as Exhibit 7 the two original telegrams received pursuant thereto.

The Court: Did the witness testify that these are carbon copies of telegrams that were sent?

Mr. Wilson: I would have to do that. There isn't any controversy between us, I think, about the papers. Is there, gentlemen?

Mr. Mulliner: There is no dispute but what they were sent and received as indicated on the originals.

The Court: On or about the date they bear? Very well, 2 is in evidence and 7 is in evidence.

Mr. Wilson: Do you have the two letters, Mr. Mulliner, of May 8th?

The Court: This No. 7 comprises the originals of No. 2?

Mr. Mulliner: That is correct.

Mr. Wilson: No. No. 7 is the telegram as received. No. 2 is the copy of the telegram as sent.

The Court: No. 7 is the original telegram that was received by the defendants? [4]

Mr. Wilson: Yes.

The Court: In other words, it is just a copy of 2?

Mr. Wilson: It should be if it was properly transmitted.

The Court: All right. I think we will just make these all one exhibit then. Make them No. 2.

[PLAINTIFFS' EXHIBIT 2]

WESTERN UNION

\* \* \* \* \*

1944 MAY 8 P M 10 13

DUPLICATE OF TELEPHONED TELEGRAM

SO411NL—SAN BERNARDINO CALIF 8

WESTERN LOAN AND BLDG CO—

308 WEST OLYMPIC BLVD LOSA—

YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED ALBERT C ARTHUR AND H B ESTES HEREBY WITHDRAW AND REVOKE THEIR OFFER DATED APRIL 1ST 1944 TO PURCHASE LOTS THIRTEEN FOURTEEN AND FIFTEEN IN BLOCK E OF THE PALMS IN THE CITY OF SAN BERNARDINO SAN BERNARDINO COUNTY CALIFORNIA COMMONLY KNOWN AS THE NORMAN MANOR AND NORMAN MANOR ANNEX APARTMENTS AND HEREBY DEMAND RETURN OF FOUR THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS DELIVERED TO YOU AS A DEPOSIT IN CONNECTION WITH SAID OFFER—

ALBERT C. ARTHUR H B ESTES.

1 1944

[Written]: Rec'd here May 10 9 15 AM. Pr—7383

Mr. Sullivan FJ 921a Mailed

(Plaintiffs' Exhibit 2)

WESTERN UNION

\*   \*   \*   \*   \*   \*   \*   \*   \*

1944 MAY 9 AM 4 13

SE6 NL—SANBERNARDINO CALIF 8

WESTERN LOAN AND BLDG CO—

SALT LAKE CITY UTAH—

YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED ALBERT C ARTHUR AND H B ESTES HEREBY WITHDRAW AND REVOKE THEIR OFFER DATED APRIL 1ST 1944 TO PURCHASE LOTS THIRTEEN FOURTEEN AND FIFTEEN IN BLOCK E OF THE PALMS IN THE CITY OF SAN BERNARDINO SAN BERNARDINO COUNTY CALIFORNIA COMMONLY KNOWN AS THE NORMAN MANOR AND NORMAN MANOR ANNEX APARTMENTS AND HEREBY DEMAND RETURN OF FOUR THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS DELIVERED TO YOU AS A DEPOSIT IN CONNECTION WITH SAID OFFER—

ALBERT C ARTHUR    H B ESTES

1 1944 E

Case No. 3815-PH Arthur, et al. vs. West. Loan. Plfs.  
Exhibit No. 2. Date Jan. 10, 1945. No. 2 in Evidence.  
Clerk. U. S. District Court, Sou. Dist. of Calif. J. M.  
Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,  
Clerk.

(Testimony of H. B. Estes)

Mr. Wilson: That is all right. Your Honor, I have the originals of the two letters marked Exhibit 3.

Q. By Mr. Wilson: Referring to the originals of the two letters marked Exhibit 3, Mr. Estes, does each of these letters bear your signature?

A. (After examining) They do.

Q. And of your co-plaintiff? A. Yes, sir.

Mr. Wilson: I would like to offer the originals, together with the copies thereof, marked Exhibit 3. as Exhibit 3.

The Court: Why encumber the record with additional copies?

Mr. Wilson: Or substitute the originals for the copies, which would probably be better.

The Court: Do you have any objection to the originals going in?

Mr. Mulliner: No, I have none, your Honor.

[PLAINTIFFS' EXHIBIT 3]

San Bernardino, California,

May 8th, 1944.

Western Loan and Building Co.,  
Salt Lake City, Utah.

Gentlemen:—

You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944, to purchase Lots Thirteen, Fourteen and Fifteen, in Block E, of the Palms, in the City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments, and hereby demand return of Four Thousand Three Hundred Thirty-seven Dol-

(Plaintiffs' Exhibit 3)

lars and Fifty Cents delivered to you as a deposit in connection with said offer.

Very truly yours,

Albert C. Arthur

H. B. Estes

San Bernardino, California,

May 8th, 1944.

Western Loan and Building Co.,

308 West Olympic Blvd.,

Los Angeles, California.

Gentlemen:—

You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944, to purchase Lots Thirteen, Fourteen and Fifteen, in Block E, of the Palms, in the City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments, and hereby demand return of Four Thousand Three Hundred Thirty-seven Dollars and Fifty Cents delivered to you as a deposit in connection with said offer.

Very truly yours,

Albert C. Arthur

H. B. Estes

[Stamped.]

Case No. 3815-PH Arthur, et al. vs. West. Loan. Plfs.  
Exhibit No. 3. Date Jan. 10, 1945. No. 3 in Evidence.  
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.  
Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,  
Clerk.



(Testimony of H. B. Estes)

The Court: All right.

I think you can probably do that with these telegrams, too, because they just encumber the record. Is there any [5] difference between the telegrams as sent?

Mr. Wilson: I don't know.

The Court: The clerk will check them while you go on with your case.

Q. By Mr. Wilson: Referring to Exhibit 4, Mr. Estes, from whom did you receive that?

A. From Western Loan & Building Company.

Q. And is the page, at the head of which we note the words Norman Manor and Norman Manor Annex Apartments—rather, does that page relate to the property involved in the offer with which we are concerned here?

A. Yes, sir.

Mr. Wilson: I will offer this as Exhibit 4.

The Court: Admitted.

[PLAINTIFFS' EXHIBIT 4]

\*\*\*\*\*

WE OWN

FREE AND CLEAR OF ENCUMBRANCE

Many Apartment Houses and Several Hotels in California

They Are FOR SALE

At Reasonable Prices and Convenient Terms

Northern California District

F. E. Sullivan

California Sales Manager

363 Fifteenth Street, Oakland

Glencourt 2436

(Plaintiffs' Exhibit 4)

Southern California District  
J. A. Carron  
Los Angeles Sales Representative  
308 West Olympic Boulevard  
Los Angeles  
PRospect 7383

Orange, Riverside, San Bernardino Counties  
Clyde Newton, Special Agent  
16 Plaza Square, Orange  
Orange 275

San Diego and Imperial Counties  
Charles R. Berdel, Special Agent  
426 B Street, San Diego  
Franklin 2565

WESTERN LOAN AND BUILDING COMPANY  
of  
Salt Lake City, Utah

\*\*\*\*\*

LA CASA CONTENTA APARTMENTS

Real Estate 4014

1660 North "E" Street  
San Bernardino, California

January, 1942

Title:	Vested clear in Seller.
Price:	\$30,000.00
Terms:	\$ 7,500.00 Cash
	\$22,500.00 Loan (Owner will fi- nance) payable at the rate of

(Plaintiffs' Exhibit 4)

\$ 202.50 Monthly, including interest.

Area of Land: 60' x 154' Approx.  
 Improvements: Modern Two Story Stucco Building  
 15 Furnished Units: 3 Singles  
 12 Doubles

Equipment: Elect. Refrig.—Garage—Tile  
 Drainboards

Income: 3 Singles: 12 Doubles:  
 3 @ \$25.00 2 @ \$32.50  
 10 @ 35.00  
 Monthly \$490.00 Yearly \$5,880.00

Fixed Expenses:	Salaries	\$807.40	
(For 1941)	Fuel	429.40	
	Electricity	386.69	
	Water	91.35	
	Power	117.55	
	Phone	21.22	
	Supplies	31.79	
	Taxes	587.07	
	Insurance	76.33	
	Miscellaneous	121.40	2,670.20

\*Total Expense

Schedule Net Income . . . . . \$3,209.80

\*Expense Repairs, painting, laundry, etc., expenses vary with different types of management and are therefore omitted.

(Plaintiffs' Exhibit 4)

While we believe the above information to be correct,  
it is not guaranteed.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY

Los Angeles Sales Office

308 West Olympic Boulevard

PRospect 7383

NORMAN MANOR and NORMAN MANOR ANNEX  
APARTMENTS

480-498 Seventeenth Street and 1745 E Street

San Bernardino, California

January, 1942

Real Estate 4427

Real Estate 4430

Title:

Vested clear in Seller.

Price:

\$87,500.00

Terms:

\$21,875.00 Cash

\$65,625.00 Loan (Owner will finance) payable at the rate of

\$ 590.63 Monthly, including interest.

Area of Land:

150' x 170' Approx.

Improvements:

Modern Two-Story Stucco Buildings

42 Furnished Units:

30 Singles      12 Doubles

(Plaintiffs' Exhibit 4)

Equipment:	Electric Refrig.—Tile Baths and Sinks		
Income:	30 Singles:	12 Doubles:	
	2 @ \$27.50		
	9 @ 30.00	1 @ \$40.00	
	12 @ 32.50	1 @ 42.50	
	7 @ 35.00	10 @ 45.00	
	Monthly . . . . .	\$1,492.50	
	Yearly . . . . .	\$17,910.00	
Fixed Expenses:	Salaries	\$3,015.89	
(For 1941)	Fuel	654.86	
	Electricity	880.85	
	Water	255.43	
	Power	209.70	
	Phone	48.48	
	Supplies	140.29	
	Taxes	2,225.73	
	Insurance	282.05	
	Miscellaneous	142.15	7,855.43

\*Total Expense

Schedule Net Income . . . . . \$10,054.57

\*Expense: Repairs, painting, laundry, etc., expenses vary with different types of management and are therefore omitted.

While we believe the above information to be correct, it is not guaranteed.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render



(Plaintiffs' Exhibit 4)

the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY  
Los Angeles Sales Office  
308 West Olympic Boulevard  
PRospect 7383

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 4. Date Jan. 10, 1945. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Q. By Mr. Wilson: From whom did you receive, if you did receive them, these documents comprising 5 for identification?

The Court: Where did this No. 4 come from?

Mr. Wilson: The same place.

The Court: The same place?

Mr. Wilson: Yes, sir. From the defendant.

Mr. Mulliner: May I see that, please?

Mr. Wilson: Pardon me. I thought you saw it (handing). The writings on the back, of course, are not to be considered as having anything to do with the lawsuit.

The Clerk: These are copies, these telegrams, Exhibit No. 2. [6]

The Court: All right, return the carbons.

Mr. Wilson: Does the original show the date it was sent?

(Testimony of H. B. Estes)

The Clerk: Yes.

Mr. Wilson: What date does it bear?

The Clerk: May 8th.

Mr. Mulliner: There is no objection to Exhibit 4, your Honor, except, of course, he says that the lead pencil notations on the back are no part of the exhibit.

Mr. Wilson: They are to be ignored.

The Court: It will be admitted except for the pencil notations on the back of the document.

Q. By Mr. Wilson: This document marked 5 for identification, from whom did you receive it?

A. Western Loan & Building Company.

Q. And does the page which relates to the Norman Manor, and so forth, Apartments refer to the property involved in this lawsuit? A. It does.

Mr. Wilson: We will ask that this be admitted as Exhibit 5.

Mr. Mulliner: We have no objection to No. 5, your Honor.

The Court: Admitted.

### [PLAINTIFFS' EXHIBIT 5]

#### WESTERN LOAN AND BUILDING COMPANY

This listing cancels all previously issued. Information herein is compiled from reliable sources, but is not guaranteed to be correct. All listings are subject to change of price or terms, prior sale, or withdrawal, all without notice of any kind, and also to all existing conditions, restrictions, zoning regulations, easements, taxes, and other encumbrances.

Important Brokers will please apply at this office for permission to inspect income properties or to show prop-

## (Plaintiffs' Exhibit 5)

erty to their clients between the hours of 10:00 A. M. and 4:00 P. M.

All information with reference to sales, terms or other data, must be secured from this office. We do not accept names of prospects registered by brokers. All offers must be accompanied by a five per cent deposit in cash, or certified or cashier check, made payable to Western Loan and Building Company. All offers are subject to approval by the Executive Committee of Western Loan and Building Company.

Five per cent (5%) commission on first \$20,000.00 and two and one-half per cent ( $2\frac{1}{2}\%$ ) on balance purchase price, payable at close of escrow, and if escrow is completed and closed and not otherwise.

Nothing contained in the above instructions or in this listing of properties shall be considered or construed as constituting an offer in any form by Western Loan and Building Company to sell any property. The above information and this listing are issued solely for the convenience of interested parties and all offers must originate with prospective purchasers. Western Loan and Building Company will not be bound in any manner by any statements contained herein.

**Terms of Sale:**

Minimum down payment twenty-five per cent (25%) of list price. (Deed will be given and deed of trust taken back for unpaid balance.) Minimum monthly payment nine dollars per month per thousand of unpaid balance

(Plaintiffs' Exhibit 5)

and includes interest. Taxes and insurance may be paid monthly in addition to regular monthly payments of interest and principal.

Interest will begin from close of escrow. Taxes, rents, insurance, salaries, utilities, etc., will be pro-rated at close of escrow. All monthly payments commence on the sixteenth day of the month. Brokers will allow at least thirty (30) days from date of deposit to date of closing.

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Falls Slightly Short of Our List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

January, 1944

NORMAN MANOR AND NORMAN MANOR  
ANNEX APARTMENTS

480-498 Seventeenth Street and 1745 E Street  
San Bernardino, California

January, 1944

Real Estate 4427

Real Estate 4430

Title: Vested clear in Seller.

Price: \$87,500.00

Terms: 21,875.00 Cash

65,625.00 Loan (Owner will finance) payable at the rate of \$590.63 Monthly, including interest.

(Plaintiffs' Exhibit 5)

Area of Land:	150' x 170' Approximately.	
Improvements:	Modern Two Story Stucco Buildings	
	42 Furnished Units: 30 Singles.	
	12 Doubles.	
Equipment:	Electric Refrigeration—Tile Baths and Sinks	
Income:	30 Singles:      12 Doubles:	
	1 @ \$27.50	1 @ \$40.00
	8 @ 30.00	1 @ 42.50
	13 @ 32.50	10 @ 45.00
	8 @ 35.00	
O.P.A. Ceiling . . .	Monthly . . . . .	\$ 1,502.50
	Yearly . . . . .	\$18,030.00
Fixed Expenses:	Fuel	806.80
(For 1943)	Electricity	939.44
	Water	332.45
	Power	214.58
	Phone	70.79
	Taxes	2,444.80
*Total Expenses:	Insurance	272.19      5,081.05
<hr/>		
Schedule Net Income . . . . .		\$12,948.95
*Expense	Salaries, supplies, repairs, painting, miscellaneous, laundry, etc., expenses vary with different types of management and are therefore omitted.	

While we believe the above information to be correct,  
it is not guaranteed.



(Plaintiffs' Exhibit 5)

It Is Our Policy to Extend Brokers the Fullest Cooperation. If Your Client's Offer Is for Less Than the List Price—Submit It—We May Be Able to Render the Assistance That Will Enable You to Close the Sale.

WESTERN LOAN AND BUILDING COMPANY

Los Angeles Sales Office

308 West Olympic Boulevard

Zone 15

PRospect 7383

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 5. Date Jan. 10, 1945. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Q. By Mr. Wilson: Referring to 6 for identification, Mr. Estes, does it bear your signature? [7] A. Yes.

Q. And that of your co-plaintiff, Albert C. Arthur?

A. Yes.

Q. And the signature on the reverse side is likewise yours? A. Yes.

Mr. Wilson: We will offer this as Exhibit 6, your Honor.

The Court: Have you seen that?

Mr. Mulliner: That is an exact duplicate, is it not, of 1?

Mr. Wilson: I wouldn't say that, Mr. Mulliner. We have no endorsement on the back of No. 1 similar to that which appears on 6.

(Testimony of H. B. Estes)

The Court: What is No. 6 and where did it come from, the blue page there, Mr. Witness?

The Witness: That was the broker's copy.

The Court: What does that mean? How did you get it?

The Witness: It was given to me by the Western Loan & Building Company.

The Court: When?

The Witness: At the time this offer was made.

The Court: At the same time you received Exhibit No. 1?

The Witness: Yes, sir.

The Court: Where did you fill those out, or did you fill them out? [8]

The Witness: I think the company filled them out.

The Court: At the office of the company?

The Witness: They brought the papers down with them and we signed them and they were all signed at the same time.

The Court: Who is "they"?

The Witness: Western Loan & Building Company.

The Court: I know, but that is a corporation. Whom do you mean by "they"? Who did it for them? What is the man's name or woman's name?

The Witness: Mr. Carron or Mr. Sullivan.

The Court: Both of them?

The Witness: One or the other.

The Court: Brought them to your office?

The Witness: Yes, sir.

The Court: When? On or about the date they bear?

The Witness: Yes, sir.

(Testimony of H. B. Estes)

The Court: And you signed them?

The Witness: I am not sure if it was signed at my office or at the California Hotel where the papers were signed.

The Court: All right.

Mr. Mulliner: You have some lead pencil notations. I suppose they can be ignored?

Mr. Wilson: They mean nothing.

Mr. Mulliner: The only difference appears to be that there is a notation on Exhibit 6 on the back with relation to brokerage fees that does not appear on the back of No. 1. [9] Otherwise they are identical.

The Court: You mean it is a printed form?

Mr. Mulliner: Yes, there is a printed form and also Mr. Estes' signature, I assume.

The Witness: Yes, sir.

The Court: All right.

Mr. Mulliner: We have no objection to Exhibit 6.

The Court: Admitted.

### [PLAINTIFFS' EXHIBIT 6]

No. 4—Managing Agent's or Broker's Copy

### OFFER TO PURCHASE

The undersigned hereby offers to purchase from Western Loan and Building Company, as owner, the following described property:

#### Legal Description

Lots 13, 14, 15 and Block E of the Palms, City of San Bernardino, San Bernardino County, California, commonly known as the Norman Manor and Norman Manor Annex Apartments.

## (Plaintiffs' Exhibit 6)

I have examined the above described property and improvements and accept the same in their present condition, waiving any and all patent or latent defects therein and agree that there are no oral representations relied upon and there are no negotiations or understandings except as herein embodied and expressed.

The undersigned Offerer understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner, Western Loan and Building Company; that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had, that some time and a substantial expense will be required, and that the exact loss and expense to Owner cannot be determined. To cover such, a deposit as stated below is agreed upon and settled as the amount required reasonably to indemnify Owner and as liquidated damage to be retained by it if after acceptance hereof this sale is not completed by reason of any fault or failure of mine, or if this offer is withdrawn prior to May 1st, 1944. The Offerer hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted, and for the consideration aforesaid, gives and grants to the Owner an exclusive option to sell said property to the undersigned herein under the terms hereof to and including said date.

Property No. R.E 4427-4430 City San Bernardino  
County San Bernardino State California

Street Address 480-98 17th St—1745 E Street Size of

(Plaintiffs' Exhibit 6)

Lot 150' x 170' (More or Less)

Albert C. Arthur, unmarried and  
Name of Purchaser H. B. Estes and Catherine Estes  
(Married..... Single.....) Age.....

Alber C. Arthur, 4th and E Streets, San Bernardino,  
Calif.

Address H. B. Estes and Catherine Estes, 439 24th St.,  
San Bernardino, Calif. City

Wife's or Husband's Name..... Age.....

Albert C. Arthur, unmarried, and  
Grant Deed to be taken in name of H. B. Estes and Cath-  
erine Estes, husband and wife, as joint tenants.  
Title to be conveyed free and clear of all encum-  
brances of record except as hereinafter specified and  
except encumbrances done, made, suffered, or incurred  
by the buyer. Subject to all restrictions, conditons,  
reservations, rights of way and easements, if any.

I Have Read the Deed of Trust HBE. ACA  
And Note, and They Are Satisfactory HBE. ACA

Sale Plan	Deed of Trust
Sale Price	\$86,750.00
Amount of Cash	\$21,000.00
Balance of	\$65,750.00 to be paid in the following

manner: In monthly installments of \$591.75 including  
6% interest & principal on the 16th day of each month,  
commencing May 16, 1944 until fully paid. Purchaser to  
pay interest at 6% in escrow on the face value of the  
note from the closing date to the date of the first pay-  
ment. Purchaser to receive a bill of sale to sellers right,  
title and interest in furniture, furnishings & equipment  
on premises and give seller a chattel mortgage to same



(Plaintiffs' Exhibit 6)

furniture, furnishings and equipment. Purchaser to furnish seller with a War Damage Insurance Policy. Purchaser to pay seller the unearned premium on \$65,750.00 Fire Insurance Policy that will be furnished by seller. Rents and Taxes to be pro-rated to closing date, also public utilities. Purchaser to have the privilege of paying an additional sum of \$4931.25 in any one calendar year and also the privilege of paying the entire balance, if any, at the end of 120 months from date of close of escrow.

All written instruments necessary to consummate this transaction shall contain, in addition to the above terms, the provisions of and shall be on owner's printed forms, copies of which have been examined by the purchaser and are by him approved.

Closing Date    May 15, 1944

Ins. to be pro rated    To closing date

Taxes to be paid by Owner    To closing date

Assessments to be paid by Owner    None

Refund \$    of earned premium to seller

By Purchaser    After closing date

By Purchaser    After closing date

This Offer Is Made at the Above Mentioned  
Price and Terms.

Subject to the Acceptance of the Owner.

I Agree to Purchase the Above Described Property on  
the Above Terms.

Albert C. Arthur    H. B. Estes  
Purchaser

.....  
Witness

Purchaser Employed By.....

(Plaintiffs' Exhibit 6)

Received the sum of \$4,337.50 as deposit on the above sales proposal, subject to conditions herein.

Date April 1st, 1944

License No. ....

Individual or Firm submitting offer

Confidential Information Sheet

\* \* \* \* \*

\* \* \* Amounting to \$4,000.00

How payable? at close of escrow \* \* \*

Payable to what person or firm? H. B. Estes, 386 Highland Ave., San Bernardino, Calif.

Remarks: (Cover any special features). H. B. Estes

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Plfs. Exhibit No. 6. Date Jan. 10, 1945. No. 6 in Evidence. Clerk. U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Case No. 3815-PH Arthur, et al. vs. West. Loan. Defts. Exhibit A. Date Jan. 10, 1945, No. A identification. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Q. By Mr. Wilson: I note on Exhibit 6, Mr. Estes, that your commission in securing the offer is fixed at \$4,000. I note also in Exhibits 4 and 5 that the commission provided is less than \$4,000. Do you have that in mind? A. Yes, sir.

(Testimony of H. B. Estes)

Q. Referring to the prospectus of January, 1942, which is Exhibit 4, the commission rate or percentage is not specified. Do you observe that?      A. Yes, sir.

Q. And that in the prospectus dated January, 1944, being our Exhibit 5, the broker's commission is specified as 5 per cent on the first \$20,000 and 2½ per cent on the balance. Of course, it is obvious that the commission on this deal at the price listed in the listing or prospectus is something over \$4,000. Did you discuss the subject of your commissions with any person identified with the defendant before this offer of Exhibit 1 was signed?

A. I discussed it with either Mr. Carron or Mr. [10] Sullivan.

Q. Who were Mr. Carron and Mr. Sullivan?

A. Well, they represent the Western Loan & Building Company.

Q. What part did they have in the negotiations which culminated in the signing of this Exhibit 1 by you and Mr. Arthur?

A. Well, they were to represent for the Western Loan & Building Company.

Q. I am not talking about what transpired after you got together. I am talking about before you began to negotiate with Mr. Arthur as a prospect along with yourself.

A. I don't understand exactly what you mean.

The Court: Who were they? How did you happen to deal with them instead of Joe Doakes of the Western Building & Loan?

The Witness: They were the representatives of the Western Building & Loan.

The Court: Did they maintain offices in San Bernardino?

(Testimony of H. B. Estes)

The Witness: They maintained offices in Los Angeles.

The Court: How do you know they were the representatives?

The Witness: Because I had contacted them in Los Angeles and they had contacted me in San Bernardino.

The Court: You mean you had called the Western Building & Loan Company here? [11]

The Witness: Yes, and they had called me in San Bernardino.

The Court: And stated they were the representatives of the Western Building & Loan?

The Witness: Well, I don't know if they stated it or not, but they were in the Western Building & Loan's office.

The Court: I see. All right.

Q. By Mr. Wilson: Did they confer with you relative to the—

The Court: You mean they were engaged there? They were not just customers standing around like in the lobby of the Biltmore Hotel?

The Witness: That was their office.

The Court: All right.

Q. By Mr. Wilson: On Exhibit 4 we have the name of F. E. Sullivan, the California sales manager of the Northern California District, and J. A. Carron, similarly designated for the Southern California District. Did you discuss with them prior to the time that you began to negotiate with Mr. Arthur this business of endeavoring to find a purchaser for this property described in the offer as the Norman Manor Apartments and Annex?

A. Yes, sir.

Q. And particularly did you discuss with them the subject of your commission? A. Yes, sir. [12]

Q. And with whom did you discuss this subject?

(Testimony of H. B. Estes)

A. With Mr. Carron and with Mr. Sullivan.

Q. When and where?

A. Well, I discussed it in their office in Los Angeles and in my office in San Bernardino.

Q. Did you discuss it with them prior to January, 1944?      A. Yes, sir.

Q. Had you represented as broker the Western Building & Loan Company in transactions prior to the one which is involved in this lawsuit?      A. Yes, sir.

Q. And as such broker had you received a commission?      A. Yes, sir.

Q. And had there been an agreed basis upon which your compensation should be computed prior to January, 1944?      A. Yes, sir.

Q. What was it?

A. It was about—I don't know the exact rate but it was about 5 per cent.

Q. When you received the prospectus, Exhibit 5, which reduced your commission from 5 per cent or thereabouts to 5 per cent of the first \$20,000 and thereafter 2½ per cent, did you discuss with Mr. Carron or Mr. Sullivan or both the subject of your commission in future deals?      A. Yes, sir.

Q. What was said by either or both? [13]

A. I told them I would have to have a full 5 per cent commission.

Q. And what was said by them?

A. They said they would take it up with their Salt Lake office and see what could be worked out.

Q. Now, on the basis of the price specified in Exhibit 1—

The Court: Pardon me. May I interrupt with a question there? Was the reverse side of Exhibit No. 6, indi-



(Testimony of H. B. Estes)

cating your brokerage fee to be \$4,000, and which you signed, filled in on or about the date the instrument bears?

The Witness: It was filled in by the Western Loan & Building Company because that is the way they brought all the papers down.

The Court: That was filled in there at the time you executed the fore part of the agreement?

The Witness: Yes, sir.

The Court: You signed your name on the reverse side at the same time with the sum of \$4,000 in there?

The Witness: Yes, sir.

The Court: All right. Excuse me.

Q. By Mr. Wilson: On the basis of the price specified in Exhibit 1 and in Exhibit 6, namely, \$86,750, a 5 per cent commission would aggregate \$4,337.50, whereas the actual commission specified on the back of Exhibit 6 is \$4,000 even. Was there any discussion about the difference between the [14] computed commission on the basis of 5 per cent and the actual commission specified in Exhibit 6?

A. The way I remember it, I cut my commission approximately \$300—

Q. Did you talk about it with somebody, discuss it with somebody?

A. I discussed it with Mr. Carron and Mr. Sullivan.

Q. All right.

The Court: What did you say and what did they say about it?

The Witness: I agreed to cut the commission \$375 and I think they cut the price of the property an equal amount, \$375.

The Court: That was the substance of your conversation with them?

(Testimony of H. B. Estes)

The Witness: Yes.

The Court: That was before you executed this?

The Witness: Yes, sir.

The Court: Before it was drawn?

The Witness: Yes.

The Court: All right.

Q. By Mr. Wilson: With relation to April 1, 1944, that being the date that you signed, apparently that is the date these documents bear, with respect to that date when did you discuss this business of cutting your commission down to \$4,000 even? [15]

Mr. Mulliner: I can't see the materiality of this, your Honor. There is no point raised on it that I know of. I will object to it as immaterial and irrelevant.

Mr. Wilson: I think the relevancy will appear later, your Honor.

The Court: What is it? Tell me.

Mr. Wilson: I am going to endeavor to show that two departures were made with respect to the listing or prospectus; first, the price as therein set forth was \$87,500, whereas the price set forth in the offer is \$86,750, or \$750 less; the second is the one I have heretofore developed, that the commission according to the prospectus would have been something less than \$4,000, just what it is I have not figured out, but that his regular commission was in fact something more than \$4,000, and, therefore, the amount of his commission, as Mr. Estes has said, was something to be determined by the main office in Salt Lake City.

The Court: All right. Overruled. What was the unanswered question? When was this conversation?

(Testimony of H. B. Estes)

Q. By Mr. Wilson: Yes, with relation to April 1, 1944.

A. I don't understand your question.

Q. You said you told Mr. Carron or Mr. Sullivan or both, before you signed this paper, Exhibit 6, in which your commission is specified as \$4,000 even, that you would cut your commission to \$4,000. Now, I want to know—and the paper bears the date of April 1, 1944. I want to know when [16] with relation to April 1, 1944, did you discuss this matter in which you said you had cut your commission to \$4,000? Was it a week or two before, or a month or two before, or when was it with relation to this particular deal that the discussion took place?

A. It was not with this one particular deal but it was any deal that I might handle for the Loan Company, that I wanted a full 5 per cent commission.

Q. Yes, you have told us that, but with respect to this particular deal in which Mr. Arthur was to be identified you said you cut your commission to \$4,000, which is something less than 5 per cent. Now, when did you first discuss cutting your commission to \$4,000 with relation to this particular deal?

A. I would say approximately a month before.

Q. How long were you and Mr. Arthur—rather, how long were you endeavoring to interest Mr. Arthur in the purchase of this property?

A. I would say approximately two months.

Q. All right. And where did this conversation occur that you have just now referred to and in which you had agreed that if the deal went over your commission would be \$4,000?

A. Well, it was either in their office or my office. I don't know which.

(Testimony of H. B. Estes)

Q. And the reply was as you have stated, that it would [17] be a subject for determination by the Salt Lake people?      A. Yes, sir.

Q. When was it that the—

The Court: I don't remember that he said they—I thought he said he agreed to cut his commission \$300 and they agreed to reduce the price.

Mr. Wilson: \$375, your Honor.

The Court: \$375. Was anything said about submitting it to Salt Lake?

The Witness: Everything would have to be submitted to Salt Lake.

The Court: Is that what they told you?

The Witness: Yes, sir, that everything would have to be submitted to Salt Lake.

The Court: Very well.

Q. By Mr. Wilson: I have already called your attention to the fact that the list price of this property, the Norman Manor and the Annex, was \$87,500.

A. Yes, sir.

Q. As shown by Exhibits 4 and 5. The offer, Exhibit 1, and the duplicate thereof, Exhibit 6, all specify the price at \$86,750, or \$750 less than the list price. Now, my question is, was there some discussion with somebody about the difference between the list price and the offered price as set forth in these two exhibits?

A. Yes, sir. [18]

Q. When and where did it take place and with whom?

A. It took place between Mr. Carron or Mr. Sullivan and myself, either in their office or my office.

Q. What was said by whom?

Mr. Mulliner: Let us see. When was this?

The Court: Yes, when was it?

(Testimony of H. B. Estes)

Mr. Mulliner: May we have the foundation?

The Witness: What date?

The Court: Approximately.

The Witness: Approximately a month. I would say.

The Court: Before April 1st?

The Witness: Yes, sir, before the contract was signed.

The Court: All right.

Q. By Mr. Wilson: What was said?

A. That they would take it up with Salt Lake, with their home office.

The Court: What did you say?

The Witness: Well, I told them I wanted a full 5 per cent commission.

The Court: No; about the price.

Q. By Mr. Wilson: We are talking about the price. The difference in price, as I have indicated, was \$750, the difference between the list price and the offered price was \$750.

A. Yes, sir.

Q. I want to know if you talked about that difference, and, if so, with whom and when? [19]

A. Yes, sir, I talked to Mr. Carron and Mr. Sullivan

Q. At the places you stated?

A. Yes, either my office or theirs.

Q. What was said?

A. They said they would take it to their home office.

The Court: What did you say?

Q. By Mr. Wilson: What did you say?

A. I don't understand.

The Court: They didn't just walk in the room and say, "We will submit it," did they, without your saying anything? You must have said something to them, didn't you? You said, "Well, I am here. I have got somebody that wants to buy the property"?



(Testimony of H. B. Estes)

The Witness: Yes, sir.

The Court: What did you say?

The Witness: I told them I had an offer on the property of that much money.

The Court: How much?

The Witness: \$86,750.

Q. By Mr. Wilson: Did you tell them from whom you had received such an offer?      A. Yes, sir.

Q. And did you identify the person in the conversation?      A. Yes, sir.

Q. Whom did you say it was?

A. Mr. Arthur. [20]

Q. Had he previously submitted an offer?

A. I don't know. Not through me.

Q. Not through you?      A. No, sir.

Q. Was this the first offer as far as he was concerned?

A. Yes, sir.

The Court: And then what did they say?

The Witness: They said they would submit it to Salt Lake City for their approval.

The Court: All right.

Q. By Mr. Wilson: Then how long after that was it before—strike that, please.

Were some papers drawn which purported to set forth the substance of the conclusions of your several negotiations, both with relation to the commission and with relation to the price?      A. Just a few days afterwards.

Q. And who prepared the papers?

A. They were prepared, I think, in the Los Angeles office.

Q. At any rate they were prepared when they were presented to you?      A. Yes, sir.

(Testimony of H. B. Estes)

Q. Was Exhibit 1 in the form in which we see it now with the exception of the signatures appended thereto, at the time it was presented to you for signature? [21]

A. Yes, sir.

Q. And the same is true with respect to Exhibit 6?

A. Yes.

Q. Exhibit 6 is your copy, the broker's copy?

A. Yes.

Q. There was still another copy, I assume?

Mr. Wilson: Wasn't there another copy, Mr. Mulliner? Do you have it?

Mr. Mulliner: Yes, we have a copy.

Mr. Wilson: This is off the record.

(Discussion off the record.)

The Court: Is it stipulated to that this offer was made up in triplicate?

Mr. Mulliner: The fact is, I think, that there was an original and three copies made.

The Court: Three carbons?

Mr. Mulliner: That is right. I think 6 is one of those copies.

The Court: Is Exhibit 1 the original?

Mr. Mulliner: Yes.

The Court: Is that stipulated to?

Mr. Wilson: Yes, your Honor.

The Court: And Exhibit 6 is one of the carbons?

Mr. Wilson: That is right.

The Court: Where are the other carbons? May that be stipulated to? [22]

Mr. Mulliner: One went to the sales office here in Los Angeles and the other went to the home office in Salt Lake City.

The Court: So stipulated?

(Testimony of H. B. Estes)

Mr. Wilson: So stipulated, your Honor.

Q. By Mr. Wilson: When these documents, the several documents which you and Mr. Arthur signed, were presented to you, who presented them?

A. Either Mr. Carron or Mr. Sullivan.

Q. At that time was there any further discussion about the variance between the commission, your commission—the variance set forth at least on Exhibit 6 and the commission as set forth in the prospectus or listing?

A. No, sir, that was settled before.

Q. There was no further discussion?

A. No, sir.

Q. When the documents were presented in the form in which we now find them, was there any further discussion relative to the variance between the price offered and the list price?

A. No, sir.

Q. Was there any discussion at that time—

The Court: Pardon me. Was Mr. Arthur present when you had any one of these conversations with Mr. Carron?

The Witness: Yes, sir, he was there when the papers were signed. [23]

The Court: He was present during the conversation at which time the papers were signed?

The Witness: Yes, sir.

The Court: Very well. All right.

Q. By Mr. Wilson: After the documents were signed, apparently in quadruplicate, of which we have Exhibits 1 and 6 as two of the four, what was done with the two which were not given, one to you and one to Mr. Arthur?

A. They were taken back to Los Angeles, I presume.

Q. Who was there?

A. Either Mr. Carron or Mr. Sullivan.

(Testimony of H. B. Estes)

Q. In other words, whoever might have been there as the representative of the defendant took these other copies with him?      A. Yes, sir.

Q. Well, at the time or prior to the time that this was accomplished, namely, the signing of these papers, what was said if anything about the next step?

A. That this deal would be submitted to the home office in Salt Lake City and we would have to wait for their approval.

Mr. Wilson: I see. You may cross examine, Mr. Mulliner.

Cross-Examination

Q. By Mr. Mulliner: Mr. Estes, weren't these papers made right there in your office?

A. The way I remember it, the papers were made up and [24] brought out from Los Angeles.

Q. Do you have a typewriter there?

A. Yes, sir.

Q. Does your wife work in your office?

A. No, sir.

Q. Did she work at any time?      A. No, sir.

Q. Did she do any typing?      A. She does typing.

Q. Did she do typing at home or in the office?

A. She will do typing sometimes at home but not in the office.

Q. Now, is it your testimony definitely that these papers were brought there or that you are uncertain, Mr. Estes?      A. I am uncertain.

Q. As to where they were written?      A. Yes, sir.

(Testimony of H. B. Estes)

Q. Now, you can surely remember when these papers were signed up whether that transaction on that day was handled by Mr. Carron or by Mr. Sullivan, can't you?

A. No, sir. I am confused on that. I don't know which one was there.

Q. Or whether they were both there?

A. They could have both been there or just one. I am not sure. [25]

Q. Now, you say when you made this offer of \$86,750, whoever handled the deal with you representing the company, or purporting to, told you that the offer would be submitted to the Salt Lake office?      A. Yes, sir.

Q. You understood that that was the procedure from your previous transactions, did you not?

A. Yes, sir.

Q. And that the price would ultimately have to be approved by the Salt Lake office?      A. Yes, sir.

Q. And you understood, did you not, that they were a building and loan association?      A. Yes, sir.

Q. That they were subject to the supervision of the Building and Loan Commissioner?      A. Yes, sir.

Q. And that certain appraisers had been designated or approved by the Building and Loan Commissioners and that those appraisers would make an appraisal of the property?      A. Yes, sir.

Q. Prior to the time of the approval of the price?

A. Yes, sir.

Q. That that was the regular procedure, the procedure that had to be followed?      A. Yes, sir. [26]

Q. Did you understand also that a director, one of the directors of the company in California, would also have to make an appraisal and give his approval?

A. I didn't know anything about a director.



(Testimony of H. B. Estes)

Q. Didn't you know that in the other transactions Mr. Scudder, Real Estate Commissioner for the State of California, had appraised the properties as a director of this company?     A. No, sir.

The Court: You mean while he was Real Estate Commissioner?

Mr. Mulliner: Yes.

The Court: Oh, I was thinking of Building and Loan Commissioner.

Mr. Mulliner: Not in that capacity, your Honor, but in the capacity of a director.

Q. By Mr. Mulliner: You can't remember in any of these transactions that you have referred to whether you discussed it with Mr. Carron or Mr. Sullivan?

A. No, sir, I don't.

Q. Or whether you discussed it with both of them?

A. It could have been with one or both.

The Court: Why? Were their offices adjacent?

The Witness: No, sir. They were in the same office but I have done a good deal of business with the two and I can't segregate these business deals.

Q. By Mr. Mulliner: Were these discussions mainly in Los [27] Angeles or mainly over at your office in San Bernardino?

A. I would say mainly in my office in San Bernardino. I think mostly in my office.

Q. Do you have any definite recollection that any of them were in the office in Los Angeles, the ones that you referred to here?

A. Maybe once or twice in Los Angeles.

(Testimony of H. B. Estes)

Q. You say "maybe." You are not sure of them?

A. No, I am not sure of that.

Q. Whoever handled the transaction told you at the time that these were signed that it would take some time to get the necessary investigation, appraisals, and approval?

A. Yes, sir.

Q. And was it for that reason that you inserted in there the 45-day or the 15th day of May as the closing date?

The Court: The 1st of May, counsel, is inserted, is it not?

Mr. Mulliner: The closing date, I think, if I am not mistaken, is the 15th.

The Court: Oh, yes. May 1st is the—

A. I know there was a date inserted in there but I don't remember the date.

Q. By Mr. Mulliner: Well, the date was set—

The Court: Closing date, May 15th.

Q. By Mr. Mulliner (Continued): —in order to give [28] them sufficient time?

A. Yes, sir.

Q. In fact, on a previous transaction that you had had, in which you were one of the purchasers, a 30-day period was set up in the same portion of the same form of contract as here but an extension was afterwards granted?

Mr. Wilson: I object to it as immaterial.

The Court: Sustained.

Mr. Mulliner: I had not quite finished the question.

The Court: I beg your pardon.

Q. By Mr. Mulliner: Because of the fact that they were unable to make the necessary investigation, get the appraisals, and have the approval within that period?

(Testimony of H. B. Estes)

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial.

Mr. Mulliner. It goes to his knowledge.

Mr. Wilson: It is his knowledge as a broker. Mr. Estes, as is obvious, occupies a dual position. As a litigant here he is, of course, a purchaser primarily or prospective purchaser, and yet in the negotiations which led up to this series of writings he was also in the status of a broker. Now, what he knows as a broker might be relevant if it referred solely to his right to a commission.

The Court: I don't think the question is material in this matter, his knowledge of the time it took. I think any knowledge that he might have had concerning their manner of accepting deals would be admissible, but not this. The [29] objection is sustained.

Q. By Mr. Mulliner: Was the \$4,337.50 referred to in this Exhibit 1 paid to anyone at the time the instrument was signed? A. Yes, sir.

Q. And how was that paid? A. By check.

Q. Do you have the check? A. No, sir.

Q. Whose check was it? A. Mr. Arthur's.

Mr. Mulliner: Do you have that check, Mr. Wilson?

Mr. Wilson: Yes (producing).

Mr. Mulliner: May I see it, please?

The Court: I notice counsel is sitting over in the jury box so he can hear. I forgot to tell you that if counsel will use the lectern in examining and cross examining the witnesses everybody talks loud enough for all to hear. So, if you could do that I am sure that everyone can hear.

Mr. Mulliner: Under your system of marking—

The Court: That will be A for Identification.

[DEFENDANT'S EXHIBIT A

FOR IDENTIFICATION]

San Bernardino, Cal. 4/1 1944 : No. 1963

AMERICAN NATIONAL BANK 90-134

Pay to the

Order of Western Loan & Bldg. Co.      \$4,337/50  
Four Thousand Three Hundred Thirty Seven and 50/100  
Dollars

Albert C. Arthur

Personal Account

\*      \*      \*      \*      \*      \*      \*      \*

[Written in pencil]: R.E.—4427-30—N. Manor &  
Annex.

[Stamped on back]: Pay to the Order of Bank of  
America National Trust and Savings Association West-  
ern Loan & Building Co. 600-6011.

[Stamped on back]: Pay to the Order of Any Bank,  
Banker or Trust Co. or Thru Los Angeles Clearing House  
Ass'n All Prior Endorsements Guaranteed. Apr 5, 44  
0600 16-66 Los Angeles Headquarters 16-66 Bank of  
America N. T. & S. A. Los Angeles, California 48

[Stamped on back]: Pay to the Order of Any Bank,  
Banker or Trust Company All Prior Endorsements Guar-  
anteed 90-132 Apr 6 1944 90-132 San Bernardino  
Branch Bank of America National Savings Association  
San Bernardino, California

Case No. 3815-PH. Arthur, et al. vs. West. Loan.  
Defts. Exhibit A. Date Jan. 10, 1945. No. A Identifica-  
tion. Clerk, U. S. District Court, Sou. Dist. of Calif.  
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,  
Clerk.

(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Did you see the check that we have just referred to on the occasion when it was delivered?

A. I saw Mr. Arthur write the check, yes, sir.

Q. Look at Exhibit A and see if you can state whether or not that is the check. [30]

A. (After examining) Yes, sir, that is the check.

Q. And the notations at the bottom of the check?

A. You mean the pencil writing?

Q. Yes. A. I don't know what that is.

The Court: Was that on there when you saw it?

The Witness: I don't believe it was.

Q. By Mr. Mulliner: Do you know whose handwriting that is? A. No, I don't.

Q. What does it say?

A. "RE-4427-30-N. Manor & Annex."

Q. That was the real estate number, wasn't it, of this property, under which it was listed and carried?

A. I am not sure. I don't know.

Q. It did have a number anyway?

A. I think so, yes.

Q. Do you think if you looked at those exhibits you could tell whether they were written on your typewriter or not, Mr. Estes? A. No, sir, I could not.

Q. You say you could not? A. No, sir.

Q. Reference was made to the telegrams—

The Court: Do you offer that check in evidence or do you just want it marked for identification? [31]

Mr. Mulliner: I have not offered it yet, your Honor. I was going to see a little more about some of the writing on there if I could.



(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Were you present when these telegrams, Exhibit 2, were written?

A. I am not sure.

Q. Did you write them?                      A. No, sir.

Mr. Wilson: Mr. Mulliner, will you accept my—

Q. By Mr. Mulliner: You didn't see them written, did you?                      A. No, sir.

Mr. Wilson: Will you accept my stipulation with respect to the drafting of those documents?

Mr. Mulliner: I will talk with you about it.

Q. By Mr. Mulliner: Well, you know now that you were not present when they were written and you didn't see them either written or sent, isn't that correct?

A. No, sir; they could have been written while I was there but I am not sure.

Q. While you were there?

A. In Mr. Wilson's office.

Q. You didn't see anybody write them?

A. Mr. Wilson took some notations down and he might have written the telegram out.

Q. That is all you saw about it, his taking some notations? [32]                      A. That is right.

Mr. Mulliner: I think that is all.

Mr. Wilson: That is all, Mr. Estes.

The Court: I have a question.

The Witness: Yes, sir.

The Court: Did you ever receive any communication in writing from the Western Building & Loan or Mr. Sullivan or Mr. Varron before May 1, 1944, that the Western Building & Loan had accepted your offer?

A. Before May 1st? What date does that offer of purchase have?

(Testimony of H. B. Estes)

The Court: This Exhibit 6 and Exhibit 1 are—the testimony has been that they were written May 1st—

Mr. Wilson: April 1st.

The Court: April 1, 1944.

The Witness: No, sir, I never received anything in writing from them that the deal had been accepted.

The Court: At any time?

The Witness: No sir.

The Court: Did you ever receive any other information that the deal had been accepted on or before May 1, 1944, from either one of the two gentlemen mentioned or anyone else representing or pretending to represent the Western Building & Loan?

The Witness: No, sir.

The Court: You did not? [33]

The Witness: No, sir.

The Court: All right.

Q. By Mr. Mulliner: Did you receive information from Mr. Arthur to the effect that he had had a telephone call from Mr. Carron with relation to that acceptance?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial, hearsay, and not the best evidence. If your Honor please, there are two questions involved; first, the corporate act, and the evidence of the corporate act would necessarily have to be some record of somebody, either officer or Board, that he or it had accepted or rejected the offer. Then in the second place we would have the communication from that person or Board to the offerer or proposer, Mr. Estes and Mr. Arthur. Now, we are not required to take cognizance of anything—

The Court: I don't know that any communication to Mr. Arthur would be binding upon Mr. Estes anyhow.

(Testimony of H. B. Estes)

because from the testimony so far it does not appear that Mr. Arthur was the agent of Mr. Estes or that Mr. Estes was necessarily the agent of Mr. Arthur. It appears that he was a principal. This is not made as an offer of partnership.

Mr. Wilson: It is a joint offer.

The Court: It is a joint offer.

Mr. Wilson: May I just interrupt a moment? My objection to the question now as to whether he did hear from Arthur or anybody else would be merely the second step in a [34] series of steps necessary to establish the ultimate fact of an acceptance. Therefore, it would be permitted to ask, "Did you hear from Mr. Arthur thus and so?" It would be better to start at the beginning and establish the corporate act.

The Court: That might be better but lawyers don't always do things the better way. Your objection is overruled.

Mr. Mulliner: Your Honor, this is a situation—

The Court: I am ruling in your favor. The objection is overruled, unless you just want to make a speech.

Mr. Mulliner: I don't want to make a speech but I want to call your Honor's attention to something which I think is important here in connection with this cross-examination. Your Honor's question opened up a field of cross-examination.

The Court: No objection was made to it. Counsel have a right to object. Do you wish to strike it?

Mr. Mulliner: I am not criticizing your Honor.

The Court: If there is any objection I will strike it.

Mr. Mulliner: What we are contending, your Honor, so that I can make myself clear, is that it is just a matter

(Testimony of H. B. Estes)

of the order of proof and procedure here and I don't want to get myself tangled up.

Mr. Wilson: You don't need to worry about that, Mr. Mulliner. I am not technical on that.

The Court: You mean you withdraw your objection or do you objection on the ground it is immaterial?

Mr. Wilson: I don't object that it is out of order. [35] I don't care whether he starts first or last with the defense.

The Court: What is your objection?

Mr. Wilson: My objection is that it is not material. It is hearsay and the foundation has not been laid. It is not the best evidence. In other words, to establish, as I said, the acceptance by the corporation, we must have something.

The Court: I think that goes to the weight of much of the examination of this witness. The question is proper.

Mr. Mulliner: I believe, your Honor, unless I am waiving some right by not doing it, I will not cross examine with relation to your Honor's questions at this time because we will present the question of notice.

The Court: I don't think you are waiving any right. You have a right to have that question answered if you so desire. Do you withdraw it?

Mr. Mulliner: I will withdraw it without waiving my right to cross examine on this point.

The Court: Do you want to recall this witness on further cross-examination?

Mr. Mulliner: Yes, or to examine him if he—on this subject again without having waived that.

The Court: I think he is through. Did you have further questions?

(Testimony of H. B. Estes)

Mr. Wilson: No.

The Court: He is through, then. [36]

Mr. Mulliner: We expect to present this question of notice, your Honor.

The Court: I think your opportunity to cross examine him upon that question of whether he had had any oral communication is at present. If you desire to call him later I think you would probably have to call him as your own witness.

Mr. Mulliner: I will ask that the witness answer the question.

The Court: Let the reporter read it.

(The question was read as follows:

"Q. Did you receive information from Mr. Arthur to the effect that he had had a telephone call from Mr. Carron with relation to that acceptance?")

The Court: Do you want to fix a date or not?

Mr. Mulliner: The question of the date is in controversy, your Honor.

The Court: All right. Do you understand the question?

The Witness: No, sir, I don't.

The Court: Read that over again.

(The question was again read.)

A. No, sir.

Q. By Mr. Mulliner: You did not have any conversation with Mr. Arthur on that subject at all?

A. I had a conversation with Mr. Arthur, stating that he had received a telephone call from Mr. Carron or Mr. Sullivan but he did not state that they had accepted the offer [37] to purchase.

Q. Mr. Estes, your deposition was taken in this matter, wasn't it?      A. Yes, sir.



(Testimony of H. B. Estes)

Q. And who took your deposition and where?

A. It was taken in San Bernardino.

Q. And by whom? A. I don't know.

Q. The reporter, Mr. Lynde? A. Yes, sir.

Q. Do you recall being asked this question at that time—

Mr. Mulliner: I call attention, Mr. Wilson, to page 19 of this witness' deposition.

The Court: We follow the practice here of first showing it to the witness and letting him read it. Here is the original. You may use this.

Mr. Mulliner: I thought perhaps your Honor would want to look at that. I believe I have another one.

Q. By Mr. Mulliner: Will you look at the question commencing just below the middle of the page there on page 19, Mr. Estes?

A. Right here (indicating)?

Q. Yes.

The Court: Line what?

Mr. Mulliner: It is line 16, where it starts. [38]

The Witness: Yes, sir.

The Court: You have read from line 16 to where, Mr. Witness?

The Witness: Through 22.

The Court: All right. Is that what you wanted him to read?

Mr. Mulliner: Yes.

Q. By Mr. Mulliner: That question and answer as given there are correct, are they?

A. Yes, sir, this is correct here.

Q. He did tell you that he had had a conversation stating that they had accepted the deal?

A. That was after May—

(Testimony of H. B. Estes)

Q. I am just asking you if he did so say to you?

A. Yes, sir.

Q. Your recollection, you were going to say, is that that was after May 1st?

A. That was between the 5th and the 10th.

Mr. Mulliner: The question, in order to have it in the record, your Honor, is:

“At any time after the inventory was signed did Mr. Arthur tell you that he had been advised by Carron verbally that Salt Lake had accepted the offer?”

The Witness: No, sir.

Q. By Mr. Mulliner: Now, wait a minute. That is the [39] question. You are looking at it, aren't you?

A. I thought you were speaking to me.

The Court: Just a minute. He is reading, and then he will say, did you or did you not so testify.

Mr. Mulliner: (Reading)

“A. I think he told me that somewhere about—oh, between the 5th and the 10th of May, that he had a conversation stating that they had accepted the deal.”

Q. By Mr. Mulliner: Did you so testify?

A. Yes, sir.

Q. And was that correct?                      A. Yes, sir.

Q. The next question, just look at line 23:

“Did he tell you who he talked to?”

“A. I think it was Carron.”

Did you so testify?                      A. Yes, sir.

Q. And was that correct?                      A. Yes, sir.

The Court: I have a deposition with some corrections on that line.

Mr. Mulliner: I am not concerned about the date of it.

(Testimony of H. B. Estes)

The Court: The corrections?

Mr. Mulliner: The corrections relate to the date.

The Court: No.

Mr. Mulliner: Don't they? [40]

The Court: No. Line 24 in the original signed deposition says:

"A. I think it was Carron or it may have been Sullivan."

Q. By Mr. Mulliner: That was the way you testified to it when the reporter took it, the way I read it to you, is that not correct? A. Yes, sir.

Q. Did you later make a correction on it in pen?

A. Yes, sir.

Q. Did you do that yourself?

A. No, sir, I did not do that myself.

Q. Who did do it?

A. I think it was—I am not sure, but I think it was the man that wrote this down.

The Court: The reporter?

The Witness: Yes, sir.

Q. By Mr. Mulliner: You told him what you wanted to put here? A. Yes, sir.

Q. Notice the next question, beginning at 25:

"Did he tell you whether or not Mr. Carron had telephoned that information?

"A. I think it was telephone."

Did you so testify? A. Yes, sir.

Q. Now, come down to 14 on the next page, page 20. I [41] am reading the question:

"Q. And he told you, as I understand, that he had just received a call from Carron that Salt Lake had accepted the offer? A. —"

(Testimony of H. B. Estes)

Now, I will read it as the reporter gave it first:

“A. Yes, but that information, I think, came after we had wired them—after Mr. Wilson had wired them that we rejected the deal.”

Now, did you so testify when your deposition was taken?     A. Yes, sir.

Q. Afterward you had cause to have inserted there, after the first word of the answer, the words “or Sullivan?”     A. Yes, sir.

Q. Do you remember the Mission Riverside deal?

A. Yes, sir.

Q. That was an apartment house sale also, was it not, in which you were one of the purchasers?

A. That is right, yes, sir.

Q. In that instance, Mr. Estes—that was handled in 1943?     A. Yes, sir.

Q. Approximately a year before this deal?

A. Yes, sir.

Q. In that transaction also the acceptance by the home office was communicated to you orally, was it not?  
[42]

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. I don't remember.

Q. By Mr. Mulliner: You have no writing showing acceptance by the home company?

Mr. Wilson: You mean on that transaction?

Mr. Mulliner: On that transaction.

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial, and not the best evidence. I happened to be in on that deal so I know something about it.

(Testimony of H. B. Estes)

The Court: I don't know what the best evidence is. He is just asking him if he had some writing. He may answer the question.

A. I don't know if I have any writing or not.

Q. You handled the Melvin Sherwood deal, did you not? A. Yes, sir.

Q. As real estate broker? A. Yes, sir.

Q. You were not a purchaser? A. No, sir.

Q. That was an apartment house deal?

A. Yes, sir.

Q. Can you tell me about when that transaction took place?

A. That was approximately, I would say, maybe six [43] months to a year previous to the Riverside Mission apartment house deal.

Q. That would be your best recollection?

A. Yes, sir.

Q. And in these apartment house deals that you had had previously, and in this apartment house deal, you had no communication except with the representatives of the sales office here in Los Angeles?

A. Yes, sir, that is right.

Q. Either Mr. Sullivan or Mr. Carron?

A. Yes, sir.

Mr. Mulliner: That is all, your Honor.

The Court: I have another question. If either side has any objection to these don't hesitate to express it. It will not offend me at all.

In response to a question on cross-examination you stated that you were in Mr. Wilson's office and he made some notes in connection with a telegram?

The Witness: Yes, sir.



(Testimony of H. B. Estes)

The Court: Is that Mr. Wilson the counsel here?

The Witness: Yes, sir.

The Court: What were you doing in his office?

The Witness: I went into his office to tell him to notify Salt Lake that we were withdrawing our offer.

The Court: Was Mr. Arthur with you?

The Witness: No, sir, I don't think he was. [44]

Mr. Mulliner: Will your Honor pardon me? I did not get a part of the witness' answer.

The Court: The reporter will read it.

(Record read.)

The Court: You consulted Mr. Wilson in a professional capacity as a lawyer in connection with this transaction?

The Witness: Yes, sir.

The Court: All right. Any other questions?

Mr. Wilson: None, your Honor.

The Court: Very well.

Q. By Mr. Mulliner: Had you consulted with Mr. Arthur about withdrawing your offer?     A. Yes, sir.

Q. When you went to Mr. Wilson's office?

A. Yes, sir.

Q. Did he go with you?     A. No, sir.

Q. Did he tell you to go?     A. Yes, sir.

Mr. Mulliner: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Wilson: Your Honor, I don't know what your practice is, but this happens to be one of the instances where I would like to take the witness stand without prejudicing my [45] clients' interests, if I may, merely to

establish the execution of these documents which I had prepared for them.

The Court: You mean the telegram and the letter?

Mr. Wilson: Yes.

The Court: I don't see how you would jeopardize your clients' interests. I think probably counsel would stipulate that you prepared them.

Mr. Wilson: I tried to get them to stipulate.

The Court: Take the stand.

Mr. Mulliner: I said I would talk with you about it. I didn't know what counsel had in mind. I am perfectly willing to do that now, your Honor.

Mr. Wilson: Will you stipulate, Mr. Mulliner, that on the 8th of May—

The Court: That if Mr. Wilson were called to the witness stand he would testify that on the 8th of May—

Mr. Wilson: Will you stipulate, as stated by his Honor, that on the 8th of May I was an attorney-at-law and still am, duly licensed to practice as such, with my offices in San Bernardino, California, and that on that day I was interviewed by Mr. H. B. Estes, and at his instance I drafted the two letters which are embraced in Exhibit 3, and thereafter and on the same day the two letters were signed by Mr. Arthur and Mr. Estes, respectively—

The Court: In your presence?

Mr. Wilson: In my presence. —and were thereupon [46] mailed by me to the addressees thereupon set forth respectively, and the contents of the letters were then sent by me on the same day as evidenced by the two documents, Exhibit 2?

The Court: By telegram?

Mr. Wilson: By telegram. In other words, the letter was transmitted by mail and also by telegram.

Mr. Mulliner: That is, if you were a witness you would so testify?

Mr. Wilson: Yes.

Mr. Mulliner: May we add to that also that these purported telegrams were night letters?

Mr. Wilson: Yes, your Honor, sent as night letters.

Mr. Mulliner: And that on the one in Exhibit 2 that was sent to the Western Loan at 308 West Olympic Boulevard, it was received in Los Angeles at 10:13 P. M. on the night of May 8th?

The Court: Whatever the telegraph record shows. That is presumptively correct.

Mr. Mulliner: That date is on here and they advised my associate, Mr. Perelli-Minetti, that that is what that date means. We have checked it.

Mr. Wilson: I will so stipulate.

The Court: All right.

Mr. Mulliner: And, that being a night letter, of course, Mr. Wilson, we can stipulate it would naturally be communicated the next morning?

The Court: I don't know about that. If you want to [47] stipulate, all right, but I don't know about that.

Mr. Wilson: I will so stipulate.

Mr. Mulliner: He says he will so stipulate.

The Court: All right.

Mr. Mulliner: The one that was addressed to the Building and Loan Company at Salt Lake City, Utah, was received at Salt Lake May 9th at 4:13.

Mr. Wilson: A. M.?

Mr. Mulliner: 4:13 A. M., and that was also a night letter.

Mr. Wilson: Yes.

Mr. Mulliner: Which would not be communicated until—

Mr. Wilson: That morning.

Mr. Mulliner: Until the day of the 9th.

Mr. Wilson: That is right.

Mr. Mulliner: On the letters here, Mr. Wilson, we have a system up in Salt Lake where our mail clerk stamps the receipt date on the letter. Can we stipulate—it is not so clear—that that is the receiving stamp of the Western Building & Loan Company at Salt Lake?

The Court: And that if the clerk were here to testify, he would testify it was placed on there on or about the date it bears? Is that the offer of your stipulation?

Mr. Mulliner: Yes, your Honor.

Mr. Wilson: I will stipulate he would so testify, but I cannot understand why it would take three days to get a [48] letter from San Bernardino to Salt Lake.

Mr. Mulliner: It does sometimes, especially if they happen to go out at night.

The Court: There are lots of things you are not supposed to understand these days. We have had them take a week to get from here to Fifth and Broadway.

Mr. Mulliner: I am somewhat in your position, I can testify to their practice because I have watched it many times.

Can we stipulate that on Exhibit 3, the part of that exhibit referring to the letter addressed to the Salt Lake City office, that the stamp in the lower right-hand corner is the receiving stamp of Western Loan & Building Company placed on it at its office in Salt Lake, indicating the time it was received there?

Mr. Wilson: So stipulated.

The Court: All right.



Mr. Mulliner: And that the mail clerk there, if she were called to testify, would testify that it was put on immediately when the letter was opened in the office?

Mr. Wilson: So stipulated.

Mr. Mulliner: They don't have a stamp at the Olympic Boulevard office here in Los Angeles, but I am told, Mr. Wilson, that that is the handwriting of the girl in the office as to the time of receipt of that letter.

The Court: Well, you have somebody in the office here who will probably be on the stand, or do you want to stipulate [49] to it?

Mr. Mulliner: This girl will so testify if she is called.

Mr. Wilson: We will stipulate she would so testify.

The Court: All right.

Mr. Mulliner: I have not so stated, but we agree to so stipulate so far, your Honor.

The Court: Very well.

Mr. Mulliner: Here is something, Mr. Wilson. It is probably not important. We had it explained to us and we may as well stipulate to it. We have already stipulated that the telegram to the Los Angeles office was received at 10:13 that night and would not be delivered until the next day. Down at the bottom there is a stamp on it, "FJ, 921." I understand that that 921 means that it was telephoned to Mr. Sullivan, whose name is given there, at 9:21 of the morning of the 9th, and at that time mailed, and that it was received at the office through the mail on May 10th.

Mr. Wilson: So stipulated.

The Court: Very well. Next witness.

Mr. Wilson: Mr. Arthur.



ALBERT C. ARTHUR,

called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

The Clerk: State your name. [50]

The Witness: Albert C. Arthur.

The Clerk: And your address?

The Witness: California Hotel, San Bernardino.

Q. By Mr. Wilson: Mr. Arthur, you are the plaintiff, or one of the plaintiffs, in this law suit?

A. Yes, sir.

Q. What is your business? A. Retail jeweler.

Q. A little louder. A. Retail Jeweler.

Q. Where?

A. San Bernardino and Huntington Park.

Q. How long have you been in that business in San Bernardino? A. Since 1927.

Q. And you still are? A. Yes, sir.

Q. Do you know the co-plaintiff, H. B. Estes?

A. Yes, sir.

Q. For a number of years you knew him as a real estate broker in San Bernardino? A. Yes, sir.

Q. Do you remember when it was that Mr. Estes first endeavored to interest you in the purchase of the Norman Manor Apartments?

A. In the first part of last year. [51]

Q. You will observe before you Exhibits 1 and 6; do they bear your signature? A. Yes, sir.

Q. Do you observe on them that the date of execution apparently is April 1, 1944? A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. With relation to that date, can you fix more definitely when you were first being solicited by Mr. Estes in connection with the purchase of this property?

A. We had talked over the property two or three months previous to this time.

Q. Do you remember when with relation to April 1st you made him a proposition and fixed a price?

Mr. Mulliner: I don't see that that is material. I will object to it as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. By Mr. Wilson: During the time that you were being solicited by Mr. Estes, was there any conversation relative to the asking price as set forth in any prospectus?

A. The prospectus was given to us.

Q. You mean you saw a prospectus?

A. Yes, sir.

Q. In which a price was specified?                      A. Yes, sir.

Q. Do you remember what the prospectus revealed with respect to the price? [52]

A. I don't remember the exact amount.

Q. You will observe, as I said, that Exhibits 1 and 6 bear your signature. Do you remember when and where you signed those documents?

A. Yes, sir. They were signed at the California Hotel.

Q. With relation to April 1st when were they signed?

A. They were signed on April 1st.

Q. Do you recall whether or not they were prepared other than the signatures prior to the time that you met in the California Hotel?

A. They were completely prepared when they were brought to the California Hotel and offered there.

(Testimony of Albert C. Arthur)

Q. By whom?

A. Mr. Carron and Mr. Sullivan.

Q. And those are the two men whom you have identified as representatives of the defendant in some capacity or other, is that right?

A. Yes, sir.

Q. Well, when the documents were presented to you did you examine the back side of Exhibit 6?

Mr. Mulliner: I will object to that as incompetent, irrelevant, and immaterial.

The Court: Overruled.

Q. By Mr. Wilson: That is, the blue one.

A. I don't recall. [53]

Q. Was the subject of Mr. Estes' commission discussed at this meeting at the California Hotel when these documents were signed?

A. Yes, sir.

Q. What do you recall was said at that time about this commission?

A. Well, the commission had been previously arranged between Mr. Sullivan and Mr. Carron and Mr. Estes. It was known to me at the time this deal was being made.

Q. Was there anything said—

The Court: Known to you to be what?

The Witness: \$4,000.

Q. By Mr. Wilson: Was anything said at that time about the commission other than what you have now revealed?

A. I don't recall anything regarding—you mean as far as this deal?

The Court: Yes, as far as this deal is concerned. This is all we are concerned with.

Mr. Wilson: Yes.

The Witness: Maybe I can explain in my words instead of answering your question. These figures were

(Testimony of Albert C. Arthur)

brought to me at the California Hotel to either accept or reject, as far as sending in a request for an offer to the Salt Lake office. They asked me to read these, and if they were satisfactory they had a rubber stamp on here which I was to sign that I read them, and submit that offer to the Salt Lake office. [54]

The Court: That was another paper?

The Witness: This paper.

The Court: Oh, that paper there?

The Witness: Yes, sir.

Q. By Mr. Wilson: When you say the California Hotel, do you mean your apartment there?

A. No, the lobby of the California Hotel.

Q. On what basis were you and Mr. Estes operating in connection with the acquisition or purported acquisition of this property?

Mr. Mulliner: I will object to that as calling for the conclusion of the witness and irrelevant and immaterial.

The Court: Sustained.

A. You mean the—

Mr. Wilson: Wait a minute.

The Court: The objection to the question was sustained and that means that you are not to answer.

Q. By Mr. Wilson: At the bottom of Exhibit A for Identification you will observe in pencil a notation, "R. E.—4427—30. N. Manor and Annex." Was that notation on there when you delivered it to the person to whom you did give it?     A. No, sir.

The Court: To whom did you give it?

The Witness: I gave the check to Mr. Sullivan and Mr. Carron. They were both there together.

(Testimony of Albert C. Arthur)

Q. By Mr. Wilson: And did you give it to them at the [55] time of this conference when these writings were signed on April 1st? A. Yes, sir.

Mr. Wilson: That is all.

Cross-Examination.

Q. By Mr. Mulliner: In addition to your jewelry business, do you operate real estate?

A. Yes, sir.

Q. Are you associated with Mr. Estes in the real estate operations? A. Yes, sir.

Q. Before these papers were prepared had you indicated that the price of \$86,750 would be satisfactory to you? A. Yes, sir.

Q. Reference was made by you, Mr. Arthur, to a rubber stamp on Exhibits 1 and 6, which I think you have in front of you. A. Yes, sir.

Q. By that you referred to the stamp reciting, "I have read the deed of trust and note, and they are satisfactory?" A. Yes, sir.

Q. That is the deed of trust that was to be subsequently executed as referred to in the instrument?

A. Those were to be brought to escrow.

The Court: What is that?

Mr. Mulliner: Those were to be brought to escrow.  
[56]

The Court: You didn't see them then?

The Witness: They had just this one sheet of which they had I don't know how many copies.

The Court: You didn't see the deed of trust or the note?

The Witness: That had to be brought to escrow.



(Testimony of Albert C. Arthur)

The Court: Did you see it? You say it was to be brought to escrow?

The Witness: No, sir.

Q. By Mr. Mulliner: Did you initial this?

A. Yes, sir.

Q. That recites that you had examined it, doesn't it? And is that Mr. Estes' initials also?     A. Yes, sir.

Q. Now, as a matter of fact, the trust deed was there at that time?

A. This is the only paper that was there.

Q. Why did you sign this rubber stamp notation that you referred to, that you had seen the deed of trust, if you had not seen it?

A. I just took their word that it would be in escrow.

Q. Do you mean by that you left the matter largely to Mr. Estes, he being a real estate broker, as to the forms of the subsequent papers?

A. Well, there was no other papers signed and the subsequent papers would have to come through escrow.

Q. That is true, but as to the form of what you were [57] going to execute subsequently to go into escrow, did you leave that up to Mr. Estes?

A. State your question again, please.

The Court: The reporter will read it.

(Question read.)

A. No. I signed an offer to purchase and the papers would be in escrow after they would be returned from Salt Lake.

Q. By Mr. Mulliner: Now, just look at that rubber stamp notation there.     A. Yes, sir.

Q. And to your initials on there. You know the instrument that that refers to, don't you, the rubber stamp there?     A. The offer to purchase.

(Testimony of Albert C. Arthur)

Q. Yes, but the instrument itself refers to a trust deed to be subsequently executed to secure the balance of this purchase price?

A. I was instructed by Mr. Carron and Mr. Sullivan that that could not be made out until it was put in escrow because all I could do would be to submit an offer to Salt Lake and they would have to give a decision.

Q. All right. All I am referring to is what you meant when you initialed this rubber stamp. You made reference to it in your testimony. This says that you have seen the trust deed and the trust note. Now, this recites in here that there [58] will be \$21,000 paid on this, and \$65,750 will be secured by a trust deed. Do you recall that?

A. I recall this whole sheet. It is still only tentative, it is no deal.

Mr. Mulliner: I ask that that go out, your Honor.

The Court: It may be stricken.

Q. By Mr. Mulliner: You have answered me that you don't recall seeing the trust deed there?

A. That is right.

Q. That was to be executed subsequently?

The Court: He has answered that he was positive he did not see it.

Mr. Mulliner: I think that is right.

The Witness: That is right.

Q. By Mr. Mulliner: Notwithstanding that, you signed this anyway? A. Yes, sir.

Q. That you had seen it? Correct?

A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. When Exhibit 1 was signed, and, of course, also Exhibit 6, I assume they were signed at the same time, and Mr. Sullivan and Mr. Carron were both there?

A. Yes, sir.

Q. You are pretty sure about that?

A. I am positive of it.

Q. You are positive? [59] A. Yes, sir.

Q. They both brought these documents completed, ready for execution? A. Yes, sir.

Q. They brought them at that time to the lobby, I think you said, of the hotel?

A. The California Hotel.

Mr. Mulliner: That is all, your Honor.

The Court: Any redirect?

Mr. Wilson: Yes, if your Honor please.

Redirect Examination.

Q. By Mr. Wilson: You say you are in the jewelry business, Mr. Arthur? A. Yes, sir.

Q. To what extent are you in the real estate business?

A. Well, I have a park in San Bernardino.

Mr. Mulliner: A what?

The Witness: A park, a recreation park.

Q. By Mr. Wilson: You mean the Pickering Park?

A. That is right.

The Court: What do you do, buy and sell real estate in your own name? Is that it? Do you buy for your own account or do you act as a broker or agent?

The Witness: No, no broker or agent. I have a couple of pieces of property of my own, income property.

The Court: I see. [60]

Q. By Mr. Wilson: When you said you were associated with Mr. Estes in real estate operations, you meant

(Testimony of Albert C. Arthur)

by that that you and he had together bought several pieces of property as co-owners?      A. Yes, sir.

Q. And is that as far as your association with him in the real estate business has extended?      A. Yes, sir.

Q. As a matter of fact, your entire time is devoted to the jewelry business except as it may be incidentally required to advise as to what he might do in connection with the operation of your jointly-owned property?

A. That is right.

Q. How much jointly-owned properties do you and he now possess?      A. Now?

Q. Yes.      A. None.

Mr. Mulliner: What was that?

The Court: None, he said.

Q. By Mr. Wilson: On April 1, 1944, did you and he own any properties together?      A. Yes, sir.

Q. How many?      A. Two.

The Court: What is the difference? I sustained an [61] objection to this line of questioning before **but you** didn't make one when he asked it on cross examination.

Mr. Wilson: That is all, your Honor.

The Court: Did you ever receive any written communication from the Western Loan & Building or Mr. Carron or Mr. Sullivan on or before May 1, 1944, that they had accepted or rejected the offer contained in Exhibit 1 and Exhibit 6?

The Witness: No, sir.

Mr. Mulliner: Your Honor—

The Court: Well, I will strike it if you wish.

Mr. Mulliner: Of course, it is our position, if your Honor will permit me, that this does not depend on a **written** communication of acceptance.

(Testimony of Albert C. Arthur)

The Court: I just asked if he had received one. You can develop any other kind of communication. I was going to ask him the same question I asked of Mr. Estes.

Did you receive any oral communication from Mr. Carron or Mr. Sullivan or any other person representing or claiming that they represented the Western Building and Loan on or before May 1, 1944, advising you that your offer was accepted?

The Witness: No, sir.

Mr. Wilson: That is the Western Loan & Building Company, your Honor.

The Court: Whatever it is. You knew who I meant, didn't you.

The Witness: Yes, sir. [62]

The Court: All right.

#### Recross Examination

Q. By Mr. Mulliner: Did you receive any oral communication that Western Loan & Building Company had accepted the proposition?

The Court: You mean at any time?

Mr. Mulliner: Yes.

A. I received a telephone call from Mr. Sullivan stating that—

The Court: When?

The Witness: On May 9th.

Q. By Mr. Mulliner: Was that the only communication that you received?

A. That is the only one relative to any acceptance of the deal.



(Testimony of Albert C. Arthur)

Q. And you say that was after May 1st, and, in fact, May 9th? A. Yes, sir.

Q. But, anyway, you did receive such a communication? A. Yes, sir.

Mr. Mulliner: I think that is all.

Mr. Wilson: That is all, Mr. Arthur.

The Court: You may step down.

(Witness excused.)

Mr. Wilson: The plaintiff rests.

Mr. Mulliner: I assume that in your Honor's practice if [63] we make a motion at this time we do not waive our right to put in evidence afterward?

The Court: Oh, no.

Mr. Mulliner: At this time, your Honor, we move for a non-suit and dismissal of the case at this time upon the ground that the plaintiffs have not made out a *prima facie* case and that their evidence is insufficient to sustain the allegations of their complaint.

The Court: On what basis? For the purpose of the record?

Mr. Mulliner: No. (After consultation.) I think, your Honor, in view of the condition of the record at this time that we will merely submit the motion.

The Court: Motion denied. We proceeded without any recess and I think we might therefore recess until 2:00 o'clock. You will be able to finish this afternoon with your testimony?

Mr. Mulliner: I would think so, your Honor.

The Court: Very well.

(Whereupon a recess was taken until 2:00 o'clock P.M. of the same day.) [64]

Afternoon Session

2:00 O'Clock

The Court: Proceed.

Mr. Mulliner: Mr. Carron, will you be sworn?

Shall I swear the witnesses all at once or one at a time?

The Court: One at a time.

JAMES CARRON,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. James Carron.

The Clerk: And your address?

A. 2702 Collier Avenue, San Diego, California.

Direct Examination

Q. By Mr. Mulliner: Mr. Carron, where do you live at this time?     A. I live in San Diego.

Q. By whom are you employed?

A. I am employed by the Alcohol Products Corporation.

Q. In the period embracing April of 1944 and for some time prior thereto, by whom were you employed?

A. By the Western Loan & Building Company.

Q. Tell us when you started to work for Western Loan.     A. I commenced on February 1, 1942. [65]

Q. Did you work for them continuously up until April of 1944?     A. Correction; May, 1944.

Q. Well, through April?

A. Through April, yes, sir.

(Testimony of James Carron)

Q. In what capacity?

A. As a salesman, real estate salesman.

Q. In what office?

A. In the Los Angeles office.

Q. Where is that located?

A. 208 West Olympic Boulevard.

Q. Were you working under anybody in that department?  
A. Yes, I was working under Mr. Sullivan.

Q. And what was his capacity?

A. Mr. Sullivan was the sales manager for the company.

Q. Now, coming to April 1, 1944, and this apartment house that is involved here, had you discussed that matter previously with anyone connected with this case?

A. Previous to—

Q. April 1, 1944?  
A. Yes, I had.

Q. With whom?

A. Oh, with various brokers and interested buyers.

Q. I mean, connected with this case.

A. No, not connected with the case except people in our own office. [66]

Q. *Has* you discussed it with Mr. Estes or Mr. Arthur?  
A. After that date, did you say?

The Court: Before April 1st.

The Witness: Before April 1st? Yes, I discussed it with them.

Q. By Mr. Mulliner: How long had you known Mr. Arthur?  
A. Oh, approximately 10 years.

Q. And how long had you known Mr. Estes?

A. About two years.

(Testimony of James Carron)

Q. In your capacity with the Western Loan had you had other business transactions with either of them?

A. No completed deals. I had negotiated with them on other properties.

Q. I don't mean with relation to this property; I mean on any properties had you had any dealings with Mr. Estes?     A. Yes.

The Court: Completed deals?

The Witness: No, sir, that is, not by myself, but with Mr. Sullivan one completed deal, Mission and Riverside.

Q. By Mr. Mulliner: There were two other apartment house deals that were mentioned this morning. You worked on those, did you not?     A. Yes, sir.

Q. Now, coming to this contract, Exhibit 1, of April 1, 1944, did you see these parties, these plaintiffs, at that time on that date? [67]     A. On that date? Yes, sir.

Q. What was the occasion of your seeing them?

A. To draw up this offer to purchase and to obtain their signatures.

Q. On that occasion did you go from the office here directly to San Bernardino?

A. Not on that day. I went to San Bernardino first, went on down to Calexico, and had this offer signed up on my way back on April 1st.

Q. That is what I was getting at. You were coming back from—     A. From Calexico.

Q. And how long had you been down there?

A. The greater part of two days.

Q. Which one of these parties did you see first when you got to San Bernardino?     A. Mr. Estes.

Q. And where did you see him?

A. Oh, as I recall it, I met Mr. Estes in the California Hotel.

(Testimony of James Carron)

Q. And did you do anything at that time with reference to drawing up this contract, Exhibits 1 and 7?

The Court: 6.

Mr. Mulliner: 6, yes. I keep calling that 7.

A. Yes.

Q. By Mr. Mulliner: What did you and Mr. Estes do in [68] relation to that?

A. I went with Mr. Estes in his car up to his home.

Q. Did you have these documents with you?

A. Yes, sir.

Q. Were they in their completed form at that time?

A. No, they were not.

Q. Had anything been done on them? A. Yes.

Q. And where was the first work done on them?

A. The first work was done in my office in Los Angeles here.

Q. And was that before you went to Calexico?

A. Yes, sir.

Q. Now, I wish you would refer to that—tell me, first, where were they completed except for the signing?

A. They were completed in Mr. Estes' home in San Bernardino.

Q. And who was present there? A. Mr. Estes, Mrs. Estes, and myself.

Q. Any typing work done? A. Yes, sir.

Q. Who did that? A. Mrs. Estes.

Q. I wish you would take that Exhibit 6 there, if you can, Mr. Carron, and just—

The Court: Let me see Exhibit 1 while he is doing that. [69]

Mr. Mulliner: I was just going to hand it to your Honor.



(Testimony of James Carron)

Q. By Mr. Mulliner: (Continuing) —and tell us what portion of that was filled out in your office here before you left and what portion was added after your discussion with Mr. Estes out there at San Bernardino.

Mr. Wilson: That is objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think it has some bearing on this matter, your Honor.

The Court: I think that it is admissible only to show the credibility of the witness Estes. That is the only ground upon which I can see its materiality and its admissibility.

Q. By Mr. Mulliner: You may proceed.

A. Will you repeat the question, please?

The Court: What was typed in by Mrs. Estes? That is what he wants to know.

Mr. Wilson: Pardon me. May I have the question read?

(Question read.)

The Court: The record should show that the exhibit is on a printed form. In the first place, all the printing was on it when you went to see Mr. Estes?

The Witness: Yes, sir.

Q. By Mr. Mulliner: These are printed forms that you had used for a considerable period of time?

A. Yes, sir. [70]

Q. How long a time?

A. Ever since I was with the company.

Q. All right. Now, proceed, if you will.

The Court: Begin at the top there, "Lots 13, 14, 15", two lines of typing.

A. The legal description was typed in in my office here in Los Angeles, that is, those two lines of copy.

(Testimony of James Carron)

The printed form, of course, remains the same. The date of May 1st, 1944, was typed in out in Mr. Estes' home. The real estate property number, 4427-4430, San Bernardino, San Bernardino County, California, and the next line had been typed in in my office here.

The Court: That is, the property number and street address?

The Witness: Yes.

The Court: The name and address of the purchaser on the next two lines?

The Witness: That was typed in out at Mr. Estes' home, on down to and including "Grant deed to be taken in name of Albert C. Arthur", and so forth, that was typed in out at Mr. Estes' home. The sale plan, "Deed of trust", was typed in in my office. The sale price, amount of cash, balance of, was typed in out at Mr. Estes' home. In the second line down the figure of \$591.75 was typed in at Mr. Estes' home.

The Court: The rest of the typing up to that you typed in? [71]

The Witness: Yes, sir. May 16, 1944, in light type, was typed in at Mr. Estes' home. Then on down to that with relation to the fire insurance premium, that figure of \$65,750 was typed in at Mr. Estes' home. Then that "Purchaser to have the privilege of paying—"

Q. By Mr. Mulliner: Just a minute, before you get there; from that figure that you just gave, those next two sentences down to the word "utilities"—

A. That was typed in in our office here.

The Court: In other words, everything beginning with "in monthly installments" in typing following the words "Balance of \$65,750 to be paid in the following manner",

(Testimony of James Carron)

from there down to and including the words "also public utilities", excepting the "591.75" and "May 16, 1944" and the figure of "\$65,750", was typed in in your office?

The Witness: Yes, sir.

The Court: Beginning now with "Purchaser", that next sentence?

The Witness: Beginning with "Purchaser to have the privilege of paying the entire balance, if any, at the end of 120 months—"

The Court: That is not the way mine reads.

The Witness: This is the fourth copy.

The Court (Reading:)

"Purchaser to have the privilege of paying an additional sum of \$4,931.25 in any one calendar year and also the [72] privilege of paying the entire balance, if any, at the end of 120 months from date of close of escrow."

The Witness: That was typed in at Mr. Estes' home.

The Court: All right. The closing date?

The Witness: Closing date, May 15, 1944, was typed in at Mr. Estes' home. Insurance to be prorated, taxes to be paid by owner, assessments to be paid by owner, all of that was typed in in my office here.

Q. By Mr. Mulliner: That is, all the typing below May 15, 1944, down to the signatures? A. Yes, sir.

The Court: What about the figures?

The Witness: The figures, "Received the sum of \$4,337.50 as deposit", that was typed in at Mr. Estes' home.

Q. By Mr. Mulliner: Going on the back of it—

The Court: And the date, April 1st, 1944?

The Witness: Also the date of April 1st, 1944, that was typed in at Mr. Estes' home.

(Testimony of James Carron)

On the back, down to the figure pertaining to the commission percentage, "amounting to", the figure of \$4,000 was typed in at Mr. Estes' home. "How payable? At close of escrow", was also typed in there. "Payable to what person or firm? H. B. Estes, 386 Highland Avenue, San Bernardino, California", was also typed in at Mr. Estes' home.

Q. By Mr. Mulliner: Those matters that were typed in at Mr. Estes' office, were those matters that were discussed [73] while you were out there? A. Yes, sir.

Q. Prior to the typing? A. Yes, sir.

Q. And why were they left blank until that time?

A. They were left blank because we had not arrived at these figures until I discussed it with Mr. Estes.

Q. Now, he has stated that he made you an offer of \$86,750. I assume that that is correct?

A. That is correct.

Q. And did you at that time also discuss his commission? A. Yes, sir.

The Court: By the way, was that the first time you had ever arrived at that figure of \$86,750 as an offer?

The Witness: As I recall it, that was the first time we arrived at that figure.

The Court: I see.

Q. By Mr. Mulliner: Had you previously discussed other figures? A. Yes.

Q. I will ask you another question. I don't know whether your answer got in the record. Did you also discuss this question of the commission on the back page at that time? A. Yes, sir, we did.

(Testimony of James Carron)

Q. Was there any discussion that you recall there about reducing the price or reducing the commission? [74]

A. Yes, there was some discussion along that line.

Q. What do you recall was said?

A. As I recall, Mr. Estes said that he felt that he should have a full 5 per cent on the purchase price, and we finally compromised on a figure of \$4,000, and he stated at the time that he was reducing it to \$4,000.

Q. That made net to the company of how much?

A. I will have to figure that.

Q. No, you don't have to do that.

The Court: Did you execute this document?

The Witness: Did I execute it?

The Court: Sign it for the Western Building & Loan?

The Witness: No, sir, that was not the procedure. We did not sign those.

The Court: Did you ever sign anything and give it to him?

The Witness: Along this line here? No, I didn't sign anything.

The Court: What did you say to him about what you would do with it?

The Witness: On this offer to purchase?

The Court: Yes.

The Witness: At the time I obtained their signatures on it I told them it would be forwarded to Salt Lake for acceptance or rejection and that they would be notified a little later on, as soon as we got word. [75]

The Court: Why to Salt Lake?

The Witness: Because all these offers had to go to Salt Lake.

The Court: Is that the head office?



(Testimony of James Carron)

The Witness: Yes, sir. May I correct that? The offer went from my office to Mr. Sullivan's office in Oakland and then was sent to Salt Lake.

The Court: Is that what you told them?

The Witness: I wouldn't swear that I told them that, but Mr. Estes—

The Court: You did tell them it had to go to Salt Lake?

The Witness: I did tell them it had to go to Salt Lake, yes, sir.

The Court: Did you say anything about your authority to accept it or not accept it, or was anything said about it?

The Witness: Well, I presumed that—I could not accept it. I don't know if we had a discussion along that line, because Mr. Estes had had dealings with us before and he knew that I did not have authority to accept the deal.

Q. By Mr. Mulliner: I show you what have been marked here as Exhibits 4 and 5. Perhaps you better tell us what that No. 4 is. What do you call it?

A. We call it a listing.

Q. What did you use it for? A. Well, we used it for brokers to use in attempting [76] to sell the properties, and occasionally a buyer. It would be given to a buyer to give him the information that he would want to know about a particular apartment house, the price, the terms, the number of units, the expenses.

Q. I have not looked at that. Does that contain a statement of earnings, expenses, and so on?

A. This one here on the second page.

(Testimony of James Carron)

Q. The next one, Exhibit 5, is that a document of the same character?     A. Yes, sir.

Q. It is perhaps not a single document; it is two or three pages, isn't it?     A. It is two pages.

Q. That is used for the same purpose?

A. Yes, sir.

Q. That apparently was a couple of years later than the other one?     A. Yes, sir.

Q. Now, were those gotten out for this particular deal or for this particular broker, Mr. Estes?

A. No, this was not gotten out just for him.

Q. Well, whom were they gotten out for?

A. They were gotten out to be used with any broker who might have a client for an apartment house building and these were given to them to help them sell the property.

Q. You stated about giving them to prospective [77] purchasers. Did you send them to the brokers in the neighborhood of the properties?     A. Yes.

Q. Did you deliver any of them to brokers in Los Angeles here?

A. Not to my knowledge. Occasionally we may have, but as a general rule a Los Angeles broker would not be interested in a property out in San Bernardino. If they inquired, if they said they had a client for property in San Bernardino, we would give them this listing.

Q. Is that what you call it, a listing?

A. Yes, sir.

Q. It is not technically a listing, is it? I listing is when you sign it—

Mr. Wilson: I object to it as immaterial and argumentative.

(Testimony of James Carron)

The Court: Sustained. That provides for the payment of commissions, does it?

The Witness: Yes, sir.

Q. By Mr. Mulliner: Now, after you had finished this instrument, Exhibit 1, what did you do? Did you have any communication with Mr. Arthur? Let us put it that way.

A. After we completed the signing of the offer to purchase?

Q. Before you got it signed, after you completed it at Mr. Estes' home. [78]

A. Yes, we had quite a bit of discussion about it.

The Court: With Mr. Arthur?

The Witness: With Mr. Arthur.

Q. By Mr. Mulliner: How did you contact Mr. Arthur?

A. Well, Mr. Arthur either was at the hotel when Estes and I went back there or he came later, but I don't recall which. But all three of us met together in the lobby.

Q. And you discussed it there, did you?

A. Yes, sir.

Q. And was it signed there? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. I notice on there a rubber stamp. Was that initialed in your presence? A. Yes, sir.

Q. Anything said about the document referred to in that rubber stamp, or the documents?

A. Relative to the deed of trust and the note?

Q. Yes.

A. Yes, there was some discussion along that line.

(Testimony of James Carron)

Q.    What was said?

A.    As I recall it, I stated that I carried with me in my brief case a copy of our trust deed note and a copy of our trust deed and that if they wanted to read those documents they were privileged to do so because they were [79] signing and stating or initialing that they had read them, and that they were available there for them to read if they so wished.

Q.    Do you recall whether either of them read them or not?            A.    I don't believe they did.

Q.    Now, do you know of your own knowledge whether or not Mr. Estes had seen those documents previously, that is, the trust deed and the trust note?

A.    In view of the fact that he had acted as broker on other Western Loan & Building properties I assume that he had seen them.

The Court:    The answer may be stricken.

Q.    By Mr. Mulliner: Had they been used by him in any deal in which he was a purchaser?

Mr. Wilson:    That is objected to as incompetent, irrelevant, and immaterial, your Honor.

The Court:    Sustained.

Q.    By Mr. Mulliner: What did you do with reference to this transaction after the signing? What was the next step that you took?

A.    As I recall it, I got in my car and came back to Los Angeles.

Q.    What did you do by way of forwarding this deal?

A.    As I recall, I forwarded the Salt Lake office copy—we kept one copy of the two and I sent one copy to Mr. Sullivan and held the other copy in our office here in Los [80] Angeles.

(Testimony of James Carron)

Q. That is what I was asking, whether or not you took it up to get Mr. Sullivan's approval.

A. It was sent to Mr. Sullivan.

Q. And did you get it?

A. Did I get Mr. Sullivan's approval?

Q. Yes.           A. Yes.

Mr. Wilson. Wait a minute. I move to strike that out on the ground it is incompetent, irrelevant, and immaterial. No foundation has been laid for it.

The Court: Sustained. It may be stricken.

Mr. Mulliner: You mean you would like to have the document?

The Court: There has been no foundation laid.

Q. By Mr. Mulliner: Well, what happened after you took it up with Mr. Sullivan?

A. Well, as I recall it, Mr. Sullivan approved it.

Mr. Wilson: I move to strike out the answer on the ground it is incompetent, irrelevant, and immaterial.

The Court: It may be stricken.

Q. By Mr. Mulliner: Where was Mr. Sullivan's office?           A. In Oakland.

Mr. Mulliner: Will you mark this?

The Clerk: Exhibit B for Identification.

The Court: Do you want to show the document to counsel [81] before you exhibit it to the witness?

M. Mulliner: Yes (handing). I may say for the record it purports to be a letter from Mr. Sullivan.

Mr. Wilson: (After examining.) If your Honor please, we object to any interrogation relative to a communication between the several representatives of the defendant upon the ground that the same is incompetent, irrelevant and immaterial, and no foundation laid for it,



(Testimony of James Carron)

and it is altogether hearsay. It seems to me, in just a brief explanation of the basis of my position, that we have now the things that transpired on the 1st of April—

The Court: I don't think you need to explain it. Your objection is good.

Mr. Wilson: Thank you.

The Court: Objection sustained.

Mr. Mulliner: I would like, just for the record, to offer it, your Honor, without being offensive as to your Honor's ruling.

The Court: You don't need to worry about being offensive. I practice at law and I know what lawyers figure on.

Mr. Mulliner: I have to figure, your Honor, that the steps that were necessarily taken in this thing and the people that were involved in the appraisals and things, bear upon this question as to the liquidated damages here and the question under the statute as to whether they were things that it was practical to separate and keep track of for the purpose of [82] assessing actual damages. That is why I was proceeding to show the steps that were taken.

The Court: This is a document which is of a different nature than what I had anticipated. Your question to this witness indicated to me that this was a letter approving this, from Mr. Sullivan. The document does not appear to be of that nature at all.

Mr. Wilson: I object upon the grounds previously stated, your Honor.

M. Mulliner: It has to do with these appraisals and investigations and things that are referred to in the document in connection with this deposit.

(Testimony of James Carron)

Mr. Wilson: And not within the issues of the case.

The Court: Yes, I think it is within the issues of their special defense, which is deemed to be denied by the plaintiffs, but even at that I don't know that this would be admissible—I believe that it probably would be admissible and the objection is sustained so far as the general purposes of the document are concerned, and is overruled in so far as it pertains to the special defense of the defendants and it will be—there is no foundation laid for it so I cannot admit it, but you can interrogate the witness about it.

M. Mulliner: I don't know whether he knows that signature that is on there or not. I will ask him.

Q. By Mr. Mulliner: Tell me, Mr. Carron, do you know that signature? [83]

A. (After examining) This signature here?

Q. Yes. A. Yes, I know it.

The Court: Did you receive that document?

The Witness: Yes, I did.

Q. By Mr. Mulliner: You received it in the mail?

A. Yes, sir.

Q. At the Los Angeles office? A. Yes, sir.

Q. Do you know who signed the name there, F. E. Sullivan?

A. It is initialed J.W., which I would take to be Jane Wood, Mr. Sullivan's secretary.

Q. At what office? A. At the Oakland office.

Mr. Mulliner: I don't know whether that foundation is sufficient or not. Perhaps I better have Mr. Sullivan on before I make any—

The Court: I think it is sufficient to get the document introduced.



(Testimony of James Carron)

Q. By Mr. Mulliner: That document refers to inspections—

The Court: What is the date of that document? [84]

Mr. Mulliner: Exhibit B, April 4, 1944.

Q. By Mr. Mulliner: Did you do anything with reference to that?

Mr. Wilson: Wait just a minute. That is objected to on the ground it is incompetent, irrelevant, and immaterial; no foundation laid for it.

Mr. Mulliner: We offer it upon the same theory, your Honor, as to the deal.

The Court: The objection is overruled. The objection is sustained generally, and overruled so far as the particular special defense is concerned and it is admitted for that limited purpose. You may answer the question.

The Witness: May I have the question again?

(Question read.)

A. Yes. Relative to inspections, I contacted or attempted to contact two appraisers and asked them to go out to the property and to make appraisals on it.

Q. By Mr. Mulliner: And who were those appraisers?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial. No foundation has been laid for it. If your Honor please, I believe in the interests of time, and with your forbearance, I would like to read a little bit from one of the cases and then state my position, and then if your Honor does not agree with me in my theory you can admit the evidence without further difficulty, but I anticipate this might be a matter of interrogation of some length. The theory [85] of the—

(Testimony of James Carron)

The Court: Let me examine the answer again on the special defense. (After examining.) I was under the impression that a separate defense was claimed for this sum of money as liquidated damages. You don't make that claim in your pleadings at all.

Mr. Mulliner: And neither does the other side, your Honor.

The Court: They don't claim, naturally, that it is liquidated damages; they claim they are entitled to the money.

Mr. Mulliner: They don't claim that it is not; that is my point.

The Court: I don't believe that it would be necessary for them to do that. They sue for money had and received. Then if you claim that it is liquidated damages, it would seem to me that it would be necessary for you to set that up in your defense by way of a special defense.

For a separate second and further defense you refer to the money and you say you are now holding it and are willing to comply with terms, but you make no claim for that sum as liquidated damages, which it was my impression that you had, because I had been reading the briefs instead of the pleadings.

Mr. Mulliner: It is raised in the brief, your Honor. I think Mr. Wilson suggests in the brief that under a [86] California statute down here we can claim it as liquidated damages. We contend that the statute simply says that if it is impracticable to assess the exact damage it is properly set up and paid as liquidated damages, and, on the other hand and further, that the cases hold—and this might



(Testimony of James Carron)

have a bearing upon your Honor's ruling—that if they want to claim otherwise it is necessary for them to plead it.

The Court: I am not familiar with that doctrine.

Mr. Mulliner: The contract recites that it is agreed to as liquidated damages.

The Court: Yes, but they have sued to recover it as money had and received. You are not claiming it as liquidated damages at all. In your answer you say you accepted, you complied, and that there isn't any liquidated damages due at all. By your answer you say you have complied with that contract and you are willing to go through with it.

Mr. Mulliner: I don't so understand our pleading, your Honor. What we claim is that they are not entitled to receive it back.

The Court: Yes.

Mr. Mulliner: They are not entitled to receive it back, and that we are entitled to it either as liquidated damages for their default or as a payment which they made on the property.

The Court: If there is a general denial and you might introduce evidence on liquidated damages, what do you think [87 and 88] of that?

Mr. Wilson: I would like to be heard on that, your Honor.

The Court: I would like to hear from you.

Mr. Wilson: The special defense, as the Court well pointed out, is predicated on the theory that this sum as alleged here is in part payment of the purchase price. It is so alleged in paragraph three. Now, then, if they were to take the other alternative and say it is not a part of the

(Testimony of James Carron)

purchase price but on the contrary it is a penalty or an award or compensation for a loss sustained by reason of a breach, it is necessary that they plead and prove facts necessary to establish their right to this exception to the general principle that liquidated damages cannot be recovered. I would like to read briefly from the—

The Court: I think that I am familiar with that general proposition of law, in the first place, that the law frowns upon liquidated damages, and, in the second place, where any sum is claimed as liquidated damages it must be specially pleaded and especially proven.

Mr. Wilson: From the facts.

The Court: Yes, from the facts. But the point now is this, whether or not in a claim for recovery of money on the common ground such as you have brought here and a general denial of that, whether or not it is permissible for them to show that you are not entitled to the money because they [89] possess it as liquidated damages. Does that case go to that point?

Mr. Wilson: I think it does.

The Court: All right.

Mr. Wilson: This is the Marsh case which I cited in the pre-trial brief and I am reading from page 576. 210 Cal. at page 576:

"In actions such as this the person claiming liquidated damages 'must show to the court by proper pleadings and competent proof that the contract falls within the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because

(Testimony of James Carron)

from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose.' (McInerney vs. Mack, *supra*, citing a long list of authorities.) This principle has been reannounced in Knight vs. Marks, 183 Cal. 354, and in many more recent decisions of this court and the District Court of Appeal."

My theory of that case is simply this, your Honor, that when the money was delivered to the defendant it held that money as a stakeholder. It was our money and it is still our money unless they have established that at some time or other and by some process or other title has become vested in them. [90] To do that they must establish that they are entitled to it either because it is a part payment of the price as pleaded or that it is a valid provision allowing them to retain it as liquidated damages. In the absence of pleading and proof that the claim is valid as liquidated damages—

The Court: In other words, if they depend upon that as a defense, they must plead that specially rather than a general denial?

Mr. Wilson: Yes. The burden upon them is to show that they have acquired title to our funds.

The Court: I am a little inclined to think that is probably correct, as otherwise, while the matter would be deemed to be denied as far as the plaintiff is concerned, the plaintiff comes into court with no notice, no pleadings whatsoever, that you are expecting to offer evidence as to what your damages were or that they were difficult of proof.

(Testimony of James Carron)

Mr. Mulliner: Yes, but you see, the burden is on them. They are making a general allegation. I wish your Honor would permit Mr. Perelli-Minetti to say a word on that. He has been briefing this question, your Honor.

The Court: All right.

Mr. Perelli-Minetti: I think that counsel's argument, if the Court please, cuts both ways. There was a demand for a bill of particulars here and one was furnished by the plaintiffs, and in their bill of particulars they simply state that there is money due which had previously been paid as a [91] deposit to apply on the purchase price and they ask the return of that money. Now, at this time they apparently feel that this money is returnable at least on one theory that it was liquidated damages. I think under the case which counsel cites and, by the way, a case in which there were other points involved—

The Court: I don't pursue you in your line of thought there.

Mr. Perelli-Minetti: I didn't understand your Honor.

The Court: You say that upon one theory the plaintiff depends upon recovery on the basis that these are liquidated damages. I thought I understood the plaintiffs' position to be that they claim recovery because the acceptance was not made within the period set forth in the contract. They claim recovery because of failure of—not failure of consideration but because there was no acceptance.

Mr. Perelli-Minetti: I think the brief of the plaintiffs answers that question. At page 2 of the pre-trial brief plaintiffs say, "This stipulation—" I am reading from the first line:



(Testimony of James Carron)

"This stipulation that the deposit shall be retained would be invalid if contained in an agreement."

The word "agreement" is underscored. Then they say: "(CC 1670, 1671). It is not less so because it is embraced in a mere 'offer'."

I don't understand counsel for the plaintiffs to have [92] ever acknowledged that there was an agreement here, and acceptance.

The Court: That is my understanding, too. There was an offer but there was no acceptance. That is your position, isn't it?

Mr. Wilson: Yes, your Honor, with this qualification. I don't want to be bound here by some misunderstanding. I want to point out now that our position is this, that the defendant occupied a dual position. First, it was in the position, the conventional position, of an owner of property receiving an offer to purchase it, and as such, of course, it was a prospective vendor. I say there is no agreement ever effected as far as a change of the properties is concerned because we contend that the vendor never communicated to us an acceptance.

Now, there was a collateral agreement. It was a stakeholder of this fund. It would have been just the same as though the fund had been placed in the hands of some other third person to hold to await the events specified in the offer.

The Court: That does not change the terms.

Mr. Wilson: No, it does not change the terms.

The Court: That does not change the terms or the legal effect of an offer and acceptance of an offer. So,



(Testimony of James Carron)

basically, your right to recover depends on whether or not there is an acceptance. [93]

Mr. Wilson: And a communication of it.

The Court: An acceptance is not an acceptance until it is communicated. You cannot accept something in your sleep.

Mr. Perelli-Minetti: That is right, your Honor. I think, your Honor, that the burden of the plea of liquidated damages is one which does fall upon the party seeking to recover the money. May I suggest to the Court since this matter of liquidated damages has been discussed, that we be permitted to make a motion at this time to amend our answer to specially plead that special defense?

The Court: It is a little late to do that thing now. After the pre-trial conference and the exchange of memoranda you filed one amended answer, and I would seriously doubt that it was a reasonable exercise of discretion to permit you to do that now.

Mr. Perelli-Minetti: If it were a matter, your Honor, which related to some new thought or some new approach which had not been presented, that might be correct, but I think this is in accordance with the briefs and it brings the pleadings in line with them.

Mr. Wilson: Your Honor, may I be heard on that?

The Court: No. I believe perhaps it might be said that the plaintiffs' initial position, or, to borrow from the language of the day, his front line position, is that there never was any acceptance, but that apparently, with caution, he is depending upon the proposition that if the Court cannot [94] agree with him and holds that there

(Testimony of James Carron)

was an acceptance, he then maintains you are not entitled to retain the money as liquidated damages. That is practically it?

Mr. Perelli-Minetti: That is right.

The Court: I don't think, under the pleadings, however, that you would be entitled to put any evidence on without a special defense that it was liquidated damages, and I believe, as you said, that nobody is surprised by your contention that it is liquidated damages.

Mr. Perelli-Minetti: I think that counsel himself just a moment ago said that he anticipated something like this.

Mr. Wilson: If your Honor pleases, I want now to object to any further amendment to the pleadings. The preparation of the trial of the case involved the taking, as you have heard, of the deposition of the plaintiffs by the defendant. There was not then any question raised with respect to the proof of the facts necessary to uphold a covenant for the payment of liquidated damages. We had a pre-trial hearing and nothing was said then that would tend to establish the facts necessary for such a covenant. Then when the amendment was made during the Christmas holidays, the position was taken *than* an affirmative defense was necessary, and that affirmative defense was that the money was received as a part payment of the price. Now, then, to permit them to put in a special second defense and to endeavor to sustain the matter of liquidated damages would mean we would have to go into a matter of [95] proof. We would, of course, like to have pleadings which would set forth the facts upon which we could depend. If we go to the pleadings we would have to go into the matter of evidence and we are

(Testimony of James Carron)

not prepared for that, we don't know what they claim as to the facts.

The Court: I think you are probably right. Objection sustained, and the motion to amend the pleadings is denied.

Mr. Perelli-Minetti: May I have the record show, your Honor, that in making that motion we do not abandon the position that we have taken before and that the burden, where there is not an agreement that it is sought as liquidated damages, is upon the plaintiffs here who have brought us into court under this general pleading that this is their money and they are entitled to the money.

The Court: Well, as you can see, I have wavered back and forth as to the proposition that under the law under a general denial you cannot introduce such evidence, but I am inclined to think that if that is a special defense it should be pleaded as a special defense with facts set out by which the plaintiff may be forewarned and prepared for trial, because they would come to court on the presumption that you were not going to rely on it unless you pleaded it.

Mr. Perelli-Minetti: Your Honor may be right about that—

The Court: Once in a while I am right, but not often.

Mr. Perelli-Minetti: Where we have a contract—I am [96] not too positive about it myself but I am not making any concessions—but where we have a pleading, your Honor, that recites specifically that it was paid in by the contract, reciting the conditions of that, when they come into court they must come in with notice that we might be holding it under the very agreement and the terms of the agreement under which it was deposited.

(Testimony of James Carron)

The Court: That would seem to me, counsel, to argue all the more in favor of a special defense, because in your answer, in your amended answer, you set up the contract, and then you set up as a special defense the proposition that it was a payment on account of the purchase price and you are ready, willing, and able to conclude it, saying nothing about the provision of the contract that it is liquidated damages. The other side is not going to depend upon that provision of the contract because it was not pleaded especially, but you plead the contract. I am sorry I cannot agree with you, but the motion is denied and the objection to the introduction of any evidence on the question of liquidated damages is sustained.

Mr. Perelli-Minetti: I assume that that obviates the necessity of any general offer, your Honor, to show that it would have been impracticable or is now impracticable to prove that—

The Court: That would all go to the same question, but you may make any offer of proof that you desire if you wish to protect your record in regard to the matter.  
[97]

Mr. Perelli-Minetti: I don't know that that is necessary, but I will make the offer of proof that this witness that is on the stand now would testify that by reason of the number of people involved in the investigation and preparation of these papers, resolutions, and so forth, including the various officers and directors of the company and the employees of the company, that it would be impracticable for us to attempt to bring them here so as to establish our actual loss or damage.

The Court: The offer of proof is rejected on the basis heretofore given in connection with the motion.



(Testimony of James Carron)

Mr. Mulliner: Counsel suggested something to me this morning that in this court we have to save exceptions.

The Court: Not any more under the rules of Federal Procedure.

Mr. Mulliner: That is what I thought.

The Court: That is the way they are written, but you cannot tell, the Supreme Court might get around to it and say that the rules are unconstitutional and void.

Mr. Mulliner: Then as a precaution I will take an exception to your Honor's ruling.

The Court: I will make this order, that any ruling which I have made during the course of the trial will be deemed excepted to by the other side, the side affected by it, with the same force and effect as if an exception were made.

Q. By Mr. Mulliner: Did you, Mr. Carron, have any [98] conversation with Mr. Estes or Mr. Arthur during the month of April on the subject of the acceptance of this deal?     A. Yes, I did.

Q. Give us the date of that.

A. As I recall it, it was April 24th.

Q. Do you have anything in your office records there or correspondence by which you are enabled to fix that date?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained. He has fixed the date.

Q. By Mr. Mulliner: Where were you at that time?

A. I was in my office at 208 West Olympic.

Q. And whom did you call?

A. I called Mr. Arthur in San Bernardino.



(Testimony of James Carron)

The Court: You mean by telephone?

The Witness: Yes, sir.

Q. By Mr. Mulliner: And you say you had known Mr. Arthur for about 10 years? A. That is correct.

Q. Had you talked with him previously?

A. On the 'phone and in person, yes.

Q. Did you recognize his voice on the telephone?

A. Yes, I would say that it was Mr. Arthur.

Q. What did you say to him and what did he say at that time on this subject?

Mr. Wilson: That is objected to as incompetent, [99] irrelevant, and immaterial, hearsay, no foundation laid for it, and not the best evidence, the best evidence being applicable to that part of the question and answer which deals with the corporate act itself.

The Court: Well, as to—I don't know whether it is the best evidence or not because I don't know what he said. This is on the question of acceptance. He might have said, "The company won't accept it" or "I don't think it is a good deal." I don't know what he said. The objection is overruled.

The Witness: What is the question again, please?

(Question read.)

A. When he answered the 'phone I said, "Hello, Art?"

He said, "Yes."

And then I said, "Congratulations."

And he said, "For what?"

And I said, "Because you are the new owner of the Norman Manor and Annex Apartments on E Street."

(Testimony of James Carron)

Then his next remark was, "So they accepted the deal, Herb?"

And I said, "Yes, they have accepted the deal."

Then he said, "What do we do now?"

I said, "Well, the next step is for me to go and take an inventory of the company-owned property."

And he said, "When will you be out?"

I said, "Oh, in the next day or so; perhaps tomorrow." [100] Then I asked him if he would make a reservation for me at the California Hotel, that I would be out the next day, April 25th, and I arranged to meet him, as I recall, at his jewelry store at about noon.

Q. By Mr. Mulliner: All right. Did you meet him?

A. Yes, sir.

Q. And then what did you do?

A. As I recall it, I went on up to the apartment house.

Q. Did you meet anybody else there?

A. Yes, I met Mr. Estes there.

Q. And what did you do there?

A. Then on the 25th we commenced taking the inventory, after discussing the matter with the manager of the apartment house.

Q. And did you proceed to complete the inventory?

A. The following day we completed it.

Q. Who participated in the taking of the inventory?

A. Mr. Estes. Mr. Arthur was there some of the time. The manager, Mrs. Lennon, was there all the time, and myself.

Q. And you worked the 25th, did you? Did you work the evening of the 25th?     A. As I recall it, we did.

Q. And finished up when?

A. Oh, about noon of the 26th.

(Testimony of James Carron)

Q. What was the general nature of it? What were you taking an inventory of? [101]

A. Well, we were taking an inventory of every item of furniture in each apartment, each carpet, kitchen utensils, bed linen, and so on.

Q. (Indicating) I don't know whether there is any particular order about that, Mr. Carron. Perhaps you could arrange the sheets for me.

Mr. Mulliner: Will you mark this?

The Clerk: Defendant's C for Identification.

Q. By Mr. Mulliner: I show you what has been marked for identification Exhibit C and ask you to state what it is.

The Court: Have you seen it, counsel?

Mr. Wilson: I have not seen that but I have a photostat of it. That is all right.

The Court: All right.

A. It is what we call a work sheet of an inventory of an apartment house.

Mr. Mulliner: I think I will offer that, Mr. Wilson.

The Court: Is that the one you took?

The Witness: Yes, sir.

The Court: On the date you mentioned?

The Witness: On the 25th and 26th of April, on the two dates.

Mr. Mulliner: I will show that it was signed up at that time, your Honor.

The Court: Do you wish to show it now?

Q. By Mr. Mulliner: Was anything done by way of signing [102] that inventory?

(Testimony of James Carron)

A. Yes. It was signed on this page by Mr. Estes and Mr. Arthur under the heading, "Accepted as correct", and the date of April 26th. This page was signed by Mr. Estes and Mr. Arthur, "Accepted as correct, April 26th."

Q. That is two?

A. This sheet was signed, "Accepted as correct, April 26th," by Mr. Estes and Mr. Arthur.

Q. That is sheet 3?

A. This sheet is signed here also, "Accepted as correct, April 26th," by Mr. Estes and Mr. Arthur.

Q. That is on the back of 3?                      A. Yes.

Q. The first three sheets that you have recited contain items of inventory on both sides and they are signed on both sides?                      A. That is correct.

Q. All right, now go to 4.

A. This sheet is signed under the heading, "Accepted as correct, 4/26/44", signed by Mr. Estes and Mr. Arthur. The reverse side is also signed by them, by Mr. Estes and Mr. Arthur.

This sheet with the heading, "Accepted as correct, 4/26/44", is signed by Mr. Estes and Mr. Arthur. This sheet under the heading, "Accepted as correct—"

Q. That is 6 now? You have just finished with 5?  
[103]

A. That is right, sheet 6. It is signed under the date of 4/26/44, and it is signed by Mr. Estes and Mr. Arthur.

Mr. Mulliner: We renew the offer, your Honor.

The Court: Admitted.

Mr. Wilson: Pardon me, your Honor. I want to make an objection.

The Court: Pardon me.

(Testimony of James Carron)

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Overruled. Admitted as Defendant's Exhibit C.

Q. By Mr. Mulliner: You have stated it was finished on the 26th? Do you know what day of the week that was, Mr. Carron?

A. If my memory is correct, it was on a Wednesday. I wouldn't be certain without looking at a calendar.

Q. And after it was signed, what did you do with it?

A. I took it back to the Los Angeles office.

Q. And was anything done with it there while you were there?

A. I delivered it to my secretary in the office and gave her instructions to type it and send it to Salt Lake.

Q. Did you type it in the form in which it is set up in Exhibit C?      A. No, sir.

Q. What has to be done with it? [104]

A. It has to be totaled or a recap made of it, as we call it. All of the different items have to be counted and then a total of each item has to be set opposite the different items in the inventory.

Q. What was the purpose of taking an inventory at this time?

Mr. Wilson: I object to it as immaterial, and a conclusion of the witness.

The Court: Sustained.

Q. By Mr. Mulliner: Was there any discussion between you and either Mr. Arthur or Mr. Estes as to what would be done with this inventory after it was taken?

A. Yes, there was a discussion.



(Testimony of James Carron)

Q.    What was said with relation to that?

A.    That it would be totaled and forwarded to Salt Lake City.

Q.    Anything further?

A.    Yes, the reason for it being forwarded to Salt Lake City was so that the items included in the inventory could be made a part of the bill of sale and also the chattel mortgage.

Q.    That is the chattel mortgage that is referred to in Exhibit 1?            A.    Yes, sir.

Q.    When did you deliver that to the sales office here in Los Angeles, if you recall?

A.    I am quite sure it was on the next day, April 27th.  
[105]

Q.    That would be what day of the week?

A.    It would be Thursday.

Q.    Can you recall whether that assembly, tabulation, and the typing was done in your office while you were there?

A.    I am a little doubtful whether it was done while I was there.

Q.    And what was the last day that you were with this company?

A.    I left the employ of the company on the following Saturday noon, which I believe was the 29th of April.

Q.    Where did you go after you left that employment?

A.    I went to San Diego.

Q.    Have you ever had any communications, telephone conversations, or anything to do with either Mr. Arthur or Mr. Estes concerning this transaction at all since that time?            A.    No, sir.

(Testimony of James Carron)

Q. Did you have any further communication with them between the 26th, the day you finished the inventory, and the 29th, when you left the employment of the Western Loan & Building Company? A. No, sir.

Mr. Mulliner: I have one more question to ask this witness, Mr. Wilson, but I would like to recall him for it after Mr. Sullivan has testified because its relevancy will not appear at this time.

Mr. Wilson: All right. [106]

Mr. Mulliner: Otherwise you may cross examine.

Mr. Wilson: No questions, if your Honor please.

The Court: All right. Step down.

(Witness excused.)

Mr. Mulliner: Mr. Sullivan, will you take the stand?

F. E. SULLIVAN,

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name?

A. F. E. Sullivan.

The Clerk: Your address?

A. 611 East 20th Street, Oakland.

Direct Examination.

Q. By Mr. Mulliner: Where do you live, Mr. Sullivan? A. In Oakland, California.

Q. And you are employed by Western Loan & Building Company? A. I am.

Q. How long have you been with that company?

A. Since April, 1928.

Q. What position did you hold with the company in 1944? A. I was California Sales Manager.

(Testimony of F. E. Sullivan)

Q. And how long have you held that position?

A. Nearly 10 years.

Q. Does your jurisdiction cover the whole State of California? [107]

A. It does.

Q. Did you have some sales experience before that time?

A. Yes, I did have.

Q. With this company?

A. Yes.

Q. How much before that?

A. Well, for one year, from June 15, 1934, to June 15, 1935, I had charge of operating apartment houses and hotels and also their sale in the Northern District, which includes anything north of the Tehachapi Range.

Q. When did you personally contact either Mr. Estes or Mr. Arthur with relation to this sale that is involved here?

A. My first contact with Mr. Arthur was when I telephoned to him—that is incorrect. I talked to Mr. Arthur and to Mr. Estes, I believe, 90 days before this offer was signed.

Q. With relation to this Manor property?

A. Yes, sir.

The Court: Excuse me, counsel. This is the time we ordinarily take a recess, but I would like to make an inquiry. I have an engagement this afternoon at 4:30 with some lawyers. It is in connection with a mandate by the Circuit Court wherein they do not agree with me, and it is necessary that I keep the appointment today. Would we be able to finish in another hour or shall we go ahead without a recess?

Mr. Mulliner: I don't think we can finish the case in [108] another hour. I can finish in less than that with this direct examination.

(Testimony of F. E. Sullivan)

The Court: I see. Then we will have to go ahead tomorrow with it anyhow.

Mr. Mulliner: Yes, your Honor.

The Court: Very well. We will have the usual recess.

(Short recess.)

The Court: The question was, when?

The Witness: The first time was about 90 days, along about in February.

The Court: That you contacted them?

The Witness: Yes, sir. Mr. Carron was with me at that time.

Q. By Mr. Mulliner: Whom did you contact at that time?

A. I contacted Mr. Estes and then went down to Mr. Arthur's jewelry store and talked to him.

Q. Was that in relation to these Manor properties?

A. Yes, sir.

Q. Did you have any further conversation with either of them in relation to this?

A. Well, at that time Mr. Arthur indicated that he would make an offer to us, which was not satisfactory, and I told him that we could not accept it.

Q. Between that and April 1st did you have any further conversation? A. No, I did not. [109]

Q. Did you have any conversation with either of them during the month of April?

A. During the month of April I didn't talk to or see either of them.

Q. And were you present in San Bernardino on April 1st when this contract, Exhibit 1, was signed up?

A. No.

(Testimony of F. E. Sullivan)

Q. After Mr. Carron had left, did you have anything to do with this inventory or carrying on the deal?

A. On May 3rd, I believe it was, I sent the inventory, the typed inventory, in to the Salt Lake office with a request for the closing papers.

Q. And by closing papers you mean what?

Mr. Wilson: Objected to as immaterial.

The Court: Overruled.

A. The closing papers would be the note or deed of trust, the chattel mortgage, and the bill of sale.

Q. By Mr. Mulliner: Any others?

A. No, that would be all.

Q. Did you mention the deed?

A. Yes, sir, there would have to be a deed.

Q. Any proration papers or insurance papers?

A. The insurance policy, of course, would have to come and the—there would be a letter accompanying those papers from Salt Lake.

Q. And you *receive* those papers from Salt Lake?  
[110]     A. I did.

Q. When?

A. I think it was about May 8th. If I could see my file there I could tell. (After examining.) Yes, sir, these papers arrived at my office on May 8th—about May 8th.

Q. Does your file indicate when they were sent from Salt Lake?

A. They were sent from Salt Lake on May 5th.

Q. After that did you have any conversation with either Mr. Estes or Mr. Arthur?

A. That morning I tried to call Mr. Estes to arrange to meet him and Mr. Arthur at the Title Company to



(Testimony of F. E. Sullivan)

deposit these papers in escrow, but I could not contact him. So, about 1:30 in the afternoon I had the telephone operator switch the call to Mr. Arthur.

Q. And did you get Mr. Arthur?

A. Yes, I did.

Q. How do you fix that time, Mr. Sullivan?

A. Well, I fix that time because of the fact these papers arrived on that date and because I have a telephone memorandum here furnished by the telephone company that substantiates my opinion that the call was made that date.

Q. Does that indicate a call to San Bernardino on that date?

A. Yes, sir, there was. There were several calls.

Q. And did you make more than one call yourself on this [111] deal?

A. Yes, sir, I did.

Q. And at what time did you get Mr. Arthur?

A. I judge that it was around 1:30 in the afternoon.

Q. What was said in that conversation?

A. That conversation was to arrange to meet with him and Mr. Estes and Mrs. Estes at the Title Company.

Q. What did you say? Just tell us now as nearly as you can what was said by both of you.

A. I said, *Hell*, Mr. Arthur."

And he said, "Yes."

I said, "This is Mr. Sullivan at Western Loan & Building Company."

He said, "Yes."

I said, "I have the papers here and am ready to close the sale."

He then replied, "We are not going through with the sale. Didn't you know?"

(Testimony of F. E. Sullivan)

I told him, no, I didn't know. I was astounded. Then I tried to quiz him to find out the reason that he was not going through with the sale and did not get a satisfactory answer. The only answer he gave me was that he had changed his mind.

Q. Had you at that time, at the time you made that call and had that conversation, received either of the telegrams or letters which appear here as Exhibits 2 and 3?

[112] A. I had not.

Q. Or any other information—

A. None whatever.

Q. —that these people were not going through on the deal, these plaintiffs? A. None whatever.

Q. Were either of these telegrams or either of these letters received by you later? A. Yes, sir.

Q. Just referring to Exhibit 2 there, is that the telegram addressed to 308 West Olympic Boulevard?

The Court: It was stipulated that they were received this morning, both the letters and the telegrams.

Q. By Mr. Mulliner: You heard the stipulation?

A. Yes.

Q. That is correct as to the time they were received?

A. That is correct.

Q. What did you do with reference to those closing papers, Mr. Sullivan?

A. Well, I still had hope that Mr. Arthur and Mr. Estes would change their minds, so I deposited them in escrow at the Security Title Insurance & Guaranty Company in San Bernardino.

Q. Was that all the papers that you have named here?

A. Yes, sir, plus a letter that I wrote to them with instructions as to the manner of closing. [113]

(Testimony of F. E. Sullivan)

Q. That is what you call your escrow instructions?

A. Yes, sir.

The Clerk: Defendant's D for Identification.

Mr. Mulliner: Exhibit D for Identification, your Honor, purports to be a typewritten copy of an inventory of Norman Manor.

Q. By Mr. Mulliner: What is that, Mr. Sullivan?

A. That is the recapitulation of the equipment from the work sheets Mr. Carron furnished, to show the exact number of items of each specific kind that are in the buildings.

Q. Where was that prepared, if you know?

A. That was typed in my office at 308 West Olympic Boulevard.

Q. And that is a copy of what was sent to Salt Lake?

A. Yes, sir.

Q. Do you have a copy of your escrow instructions to the Title Company.

A. Yes, sir, I have them here (producing).

The Clerk: Defendant's E for Identification.

Mr. Mulliner: E for Identification purports to be a letter addressed to the Security Title Insurance & Guaranty Company.

The Court: Has counsel seen a copy?

(The statement was handed to counsel.)

Q. By Mr. Mulliner: I show you what has been marked for identification Defendant's Exhibit E, Mr. Sullivan, and I ask [114] you to state what it is.

A. That is a copy of the letter that I directed to the Title Company on May 9th and on which they acknowledged receipt of these papers by their escrow officer.

(Testimony of F. E. Sullivan)

Q. Did you deliver the papers and take them there personally?     A. I did.

Q. On the date that the letter and the receipt bear?

A. That is correct; May 9th.

Mr. Mulliner: I will offer first Exhibit D, if your Honor please.

The Court: The typewritten copy of the inventory?

Mr. Mulliner: Yes.

Mr. Wilson: I have no objection.

The Court: Admitted as Exhibit D.

Mr. Mulliner: I offer now Exhibit E, your Honor. This has just been identified as the escrow instructions.

Mr. Wilson: I object to it as immaterial.

The Court: Overruled.

[DEFENDANT'S EXHIBIT E]

308 West Olympic Blvd., Los Angeles, California

May 9, 1944

Security Insurance & Guarantee Company,

480 Court Street,

San Bernardino, California

Re: 4427-4430 Norman Manor & Norman Manor Annex  
Apartments.

Gentlemen:

Please be advised that we have received and accepted an offer for our above numbered properties from Mr. Albert C. Arthur and H. B. & Catherine Estes and wish to deposit the closing documents with you, as agent, to complete the transaction. We enclose the following:

Grant Deed to Albert C. Arthur, an unmarried man, and H. B. Estes and Catherine Estes, husband and wife, as joint tenants.

(Defendant's Exhibit E)

Note for \$65,750.00

Deed of Trust

Chattel Mortgage

Bill of Sale to Albert C. Arthur, an unmarried man, and H. B. Estes and Catherine Estes, husband and wife, as joint tenants.

Title Insurance Policy No. 118045 33/468 Norris issued by the Security Title Insurance and Guarantee Company for \$73,006.33, dated January 21, 1933 (RE 4427).

Title Insurance Policy No. 118044 Norris 33/468 issued by the Security Title Insurance and Guarantee Company for \$21,041.77, dated January 21, 1933 (RE 4430).

United States Fire Insurance Company Policy CL No. 30702 for \$46,000.00 premium \$610.42, expiring April 25, 1947 (RE 4427)

United States Fire Insurance Company Policy CL No. 30703 for \$20,000.00 premium \$189.40, expiring April 25, 1947 (RE 4430)

The purchase price of this property is \$86,750.00, the purchasers have agreed to pay this company \$21,000.00 cash and the balance of the purchase price is represented by the enclosed Deed of Trust.

You are authorized to use the enclosed instruments providing you collect \$21,000.00 cash, less \$4,337.50 that has already been paid to us and providing you will issue a joint protection title insurance policy, showing title perfect in the applicants and the enclosed Deed of Trust the first lien against the property.

The purchasers are to pay interest on the face value of the note from the closing date to the date of the first payment. Please collect this interest in escrow.



(Defendant's Exhibit E)

Rents, taxes and the premium on the enclosed Fire Insurance Policies are to be pro-rated to the closing date. You will kindly collect the unearned premium on the Fire Insurance Policies from the purchasers.

The purchasers have agreed to furnish a War Risk Insurance Company Policy showing loss payable clause to Western Loan and Building Company. This policy is to be in an amount of at least \$65,750.00.

The 1943 taxes, in the amount of \$2398.72 have been paid in full by this company and are to be pro-rated to the closing date. You will kindly collect the portion of these taxes due this company from the purchasers.

As required, the purchasers are to place the down payment into escrow except the \$4337.50 that has already been paid to us as an earnest money deposit and out of the proceeds of the escrow you are authorized to disburse costs for the Title Insurance Policy, Escrow Fee, Federal Revenue Stamps and \$4,000.00 commission due Real Estate Broker, H. B. Estes. This commission due Mr. Estes is only to be paid if the transaction is completed and closed and not otherwise.

A closing date of no later than May 15, 1944 has been agreed upon and as soon as the purchasers deposit the balance of the funds required to complete the transaction in the escrow you are hereby directed to complete the enclosed notices to utility companies and mail them in order that these services may be terminated and closing bills obtained by Western Loan and Building Co.

A rental pro-ration statement will be deposited with you prior to the escrows closing.

(Defendant's Exhibit E)

It is understood and agreed that you accept this letter and all the enclosures with the distinct understanding that if this transaction is not complete and closed by the close of business on May 15, 1944 that this letter and all enclosures will be returned to Western Loan and Building Co. at 308 West Olympic Blvd., Los Angeles, California.

Kindly attach our mortgage clause and endorsements showing the purchasers to be the assured to the attached fire insurance policy.

When the transaction is completed and closed please forward all papers enclosed herein, except the grant deed and bill of sale, properly executed together with your Title Insurance Policy, a statement of the escrow receipts and disbursements in triplicate and your check for the net proceeds of the sale to this company at 308 West Olympic Blvd., Los Angeles, California.


Kindly acknowledge receipt of enclosures on the attached copy of this letter.

Yours very truly,

WESTERN LOAN & BLDG. CO.  
F. E. SULLIVAN  
California Sales Manager

Important—The undersigned hereby acknowledges receipt of the original of this letter with its enclosures.

Security Title Insurance and Guarantee Company

Please sign here  By J. W. Berry, Escrow Officer  
Date May 9, 1944 and return to Western Loan and Building Company, 308 West Olympic Blvd., Los Angeles 15, California.

(Defendant's Exhibit E)

Copy

May 10, 1944

Security Title Insurance & Guarantee Co.

480 Court Street

San Bernardino, California

In Connection Escrow #160572-JWB

RE: 4427-4430

Norman Manor & Norman Manor  
Annex Apartments.

Gentlemen:

In connection with our above account and your Escrow, we hand you herewith rent proration statements compiled to and including May 15, 1944, in which you will *not* that \$233.58 is due the purchasers in connection with the Norman Manor Apartments and \$148.83 is due them in connection with the Norman Manor Annex Apartments. The aggregate rent proration due the purchasers is \$381.91, which you are authorized to pay to them upon completion of sale from proceeds in Escrow.

The Western Loan and Building Company has collected advance cleaning charges from tenants as itemized in the rent pro-ration statements. You are also authorized to pay this sum aggregating \$60.00 to the purchasers from proceeds in the Escrow upon completion of the sale.

Rent accounts due from a number of the tenants are to be paid between the date the attached statements were compiled and the scheduled closing date of May 15th, and these tenants therefore owe rent as shown in the statements by their respective circled accounts. To simplify the pro-ration, the Western Loan and Building Company has taken credit for these rents due from the Norman

(Defendant's Exhibit E)

Manor Apartment tenants, in the amount of \$78.57 and from the Norman Manor Annex Apartment tenants in the amount of \$16.00, or an aggregate amount of \$94.57. If the purchasers object to this company taking credit for this sum, you are hereby authorized to add \$94.57 to the rent proration due the purchasers and deduct this sum from the net proceeds of the Escrow, after the sale has closed.

You are authorized to close this sale prior to May 15, 1944 if requested to do so by the purchasers, and you will deduct the sum of \$47.41 for each day prior to May 15, 1944, from the amount of the rent-pro-ration due the purchasers.

Yours very truly,

WESTERN LOAN & BLDG. CO.  
BY F. E. SULLIVAN

FES:sbs

\* \* \* \* \*

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit E. Date Jan. 10, 1945. No. E in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

The Court: (Indicating) Were those attached to the letter?

Q. By Mr. Mulliner: Will you answer that?

A. They were attached to the letter.

The Court: Are those the originals?

(Testimony of F. E. Sullivan)

The Witness: Those are the originals.

The Court: That were delivered to the Title Company? [115]

The Witness: Delivered to the Title Company.

The Court: And that consists of the documents you have heretofore mentioned?

The Witness: Yes.

The Court: Let us attach them to Exhibit E. They were delivered with the letter?

The Witness: Yes.

Mr. Wilson: May I look at them?

Mr. Mulliner: Yes (handing). I may ask the witness to go through them again and see if they are all there.

Q. By Mr. Mulliner: Calling your attention again to Exhibit E, Mr. Sullivan, to which you just referred, and to the documents which are now attached to it, will you just go through and state what those documents are?

A. The first document is a grant deed to Albert C. Arthur, an unmarried man, and H. D. Estes and Kathleen Estes, husband and wife, as joint tenants.

Q. Is that deed executed by the proper officers of Western Loan & Building Company?     A. It is.

Q. What is the next document?

A. The next document is a bill of sale.

The Court: Who are those officers?

The Witness: The vice president signing this deed is C. J. Sumner, and R. B. Ritchie, secretary of the company, also signed. [116]

The Court: Are you an officer?

The Witness: No, sir.



(Testimony of F. E. Sullivan)

The Court: Were you during that period or at any time?

The Witness: No, sir.

The Court: Go ahead. Excuse my interruption.

A. (Continuing) And there is this bill of sale to the equipment that is described in that inventory, which is also executed by C. J. Sumner, vice president, and R. B. Ritchie, secretary. And there is a deed of trust prepared for Albert C. Arthur, an unmarried man, H. V. Estes and Kathleen Estes, husband and wife as joint tenants, which was furnished the escrow for their convenience on our forms, and a trust deed note for the balance due of \$65,750. They are all dated May 5, 1944. There is the chattel mortgage for the same equipment as itemized in the inventory that is prepared for the signatures of Albert C. Arthur and H. V. Estes and Kathleen Estes. This rent proration statement here was not deposited with these papers but was deposited the next day.

Q. By Mr. Mulliner: What is that?

A. That is a rent proration statement compiled to May 15th to prorate rents so as to give the purchasers any advance rents we might have collected from the tenants.

Q. And is that contained in your escrow instructions to the company?

A. It is in the supplementary instructions that I filed with them on May 10th. [117]

The Court: It will all be part of Exhibit E and admitted. Do you want to record an objection?

Mr. Wilson: Do I understand that the two rental statements were later delivered to the company?

(Testimony of F. E. Sullivan)

Mr. Mulliner: Yes, he said this last document, the prorate of rents on the apartments, was delivered the next day. We might take out the supplemental instruction sheet, and his Honor has—

The Court: That can all be attached to Exhibit E and admitted.

Q. By Mr. Mulliner: Did you deliver this proration statement and the supplement yourself personally to the Title Company? A. I did.

Q. And that, you said, was on the 10th?

A. Yes, sir.

Mr. Mulliner: Now, Mr. Wilson, can we stipulate that the plaintiffs were advised that these instruments were there in escrow and that they declined to execute them or proceed further with them?

Mr. Wilson: We will stipulate we were so advised on May 10th.

Mr. Mulliner: Well, the date is May 10th—

The Court: But you were advised they were in escrow on May 10th?

Mr. Wilson: Yes. [118]

The Court: He asked more in the stipulation.

Mr. Mulliner: They did not proceed with it, they declined to go forward?

Mr. Wilson: That is right. We will so stipulate. They received notice that the documents referred to, or at least the documents in a general way, were with the Title Company on May 10th.

(Testimony of F. E. Sullivan)

The Court: When did you get them back from the Title Company?

The Witness: I asked them in a letter I sent them on the 17th and their transmittal letter is dated May 22nd.

Q. By Mr. Mulliner: Was that after the Title Company had advised you that the parties had refused to come in to the escrow? A. Yes, sir.

Q. I show you now what has been marked as Exhibit F, Mr. Sullivan, and ask you to state briefly what that is.

The Court: Has counsel seen it?

The Witness: This is a statement from the Southern California Telephone Company for telephone bills incurred for the period April 12th to May 8th, and there is one there on May 9th, a separate statement.

Q. By Mr. Mulliner: It covers the period including April 25th and May 8th, does it? A. Yes, it does.

Q. Is that the original bill as received in your office [119] from the Telephone Company, and the original toll bills as delivered to your office from the company?

A. Yes, sir.

Q. Covering those dates? A. Yes, sir.

Mr. Mulliner: We offer this exhibit, your Honor, and particularly the entries as to toll charges thereon for April 24th and May 8th.

The Court: Admitted as Exhibit F.

[DEFENDANT'S EXHIBIT F.]

TO SOUTHERN CALIFORNIA TELEPHONE  
COMPANY, Dr.

740 South Olive Street, Los Angeles 55

[Crest]

(See Reverse of Stub for Addresses of Other Telephone  
Business Offices)

If this bill is not paid within fifteen days from date of  
presentation, service may be discontinued, in which event  
restoration will not be made until this bill has been paid.

May 11, 1944

Approved for payment—Sundry Rental—Advances or  
general expense Adm Exp Acct. No. 5 Phone Number  
Western Loan & Building Co., 1005 S. Hill D. F.

7383

PR

9-3

Exchange service charges for one  
month preceding date of this  
bill 15 (incl. U. S. tax of

5.34✓

40.94

35.60 + 15% tax ~~5.34~~)

~~40.94~~

Message unit charges to date of

this bill (total message units used

1.147) (incl. U. S. tax of 40.15 + 6.02)

46.17✓

Toll, telegram, and messenger charges

(statement enclosed)

26.81✓

Other charges or credits (explanation en-  
closed)

1.50✓

45191

Directory advertising charges for one month  
beginning with date of this bill.....

(Defendant's Exhibit F)

Balance from previous bill (Please deduct  
from total any amount of this balance paid  
before receiving this bill) .....

Total .....	<del>115.42</del> ✓
	115.42

[Stamped]: May 19, 1944.

## Rule and Regulation Regarding Disputed Bills

*In case of a dispute between the subscriber and the Company as to the correct amount of a bill rendered by the Company for service furnished to the subscriber, which cannot be adjusted with mutual satisfaction, the subscriber may deposit with the Railroad Commission of the State of California at its office in the State Building, Los Angeles, the amount claimed by the Company to be due. Deposit checks, money orders, etc., must be made payable to the "Railroad Commission, State of California." Upon receipt of said deposit, the Commission will investigate the complaint and communicate its findings to the parties.*

*Failure on the part of the subscriber to make such deposit with the Railroad Commission within fifteen days after notice by the Company that such deposit must be made or service may be discontinued, shall warrant the Company in discontinuing the service without further notice.*

## Notice

Bills are not paid until the money is received at one of our established collection offices, and the customer must assume responsibility for any delays in our receipt of money or for our failure to receive money, turned over to other agencies for payment to us.



(Defendant's Exhibit F)

Toll Service and Telegrams

Place Called\*

For Abbreviations, See Reverse

Pro 7383

		Amount	*Tax
May	FWD		
9	2144 SBO—RE	45	
	43057 SLK—RE	2 50	
	Credit Plan Calls		
Apr	4UD 633		
8	BH to Oak	1 10	

---

 Total of Above Service Charges 21 45✓

---

 Total U.S. Federal Tax 5 36✓

---

 Total Carried to Bill 26 81✓

\*U. S. Tax Schedule

15%—Telephone messages under 25c

25%—Telephone messages, 25c and over

25%—Telegraph messages domestic

10%—Telegraph messages international

\*Explanation of Code following

“Place Called”

A—This Company Telegram

B—Other Company Telegram, Cable  
or Radio Message

C—Collect Message

Toll Service and Telegrams

Place Called\*

For Abbreviations, See Reverse

(Defendant's Exhibit F)

Pro 7383

		Amount	*Tax
Apr			
12	Lamon SBO✓	55	
13	53172 SBO✓	45	
	53172SB O✓	45	
22	43057 SLK✓	2 85	
24	Lannon SBO✓	55	
	Arthur SBO RE	55	
26	Hernan 6LTN✓	50	
27	CLX T LA✓	2 20	
	LA to CLX✓	2 40	
29	2486 RIV✓	40	

May

1	275 ORG✓	35	
2	" ✓	80	
6	Jansen Elc RE	1 85	
8	Carron SD—RE	1 10	
	5831 SBO—RE	45	
	Arhturs SBO—RE	1 10	
	Estes SBO—RE	85	

---

Total of Above Service Charges

---

Total U. S. Federal Tax

---

Total Carried to Bill

✓

\*U. S. Tax Schedule

15%—Telephone messages under 25c

25%—Telephone messages, 25c and over

## (Defendant's Exhibit F)

25%—Telegraph messages domestic

10%—Telegraph messages international

\*Explanation of Code following  
"Place Called"

A—This Company Telegram

B—Other Company Telegram, Cable  
or Radio Message

C—Collect Message

Southern California Telephone Company

Explanation of "Other Charges and Credits"

Appearing on the Enclosed Bill

Pr 7383

Item	Monthly Rate	Period (See Note) From	To	Charge or Credit
Charge for Moving				
Extension Telephone				
May 4				1 50

Mr. Thornburg's phone.

Total Carried to Bill	1 50
-----------------------	------

Note: The period shown is from date of connection, dis-  
connection or change to the date of the enclosed bill  
unless otherwise explained in the associated item.

Case No. 3815-PH. Arthur. et al. vs. West. Loan.  
Defts. Exhibit F. Date Jan. 10, 1945. No. F in Evi-  
dence. Clerk, U. S. District Court, Sou. Dist. of Calif.  
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,  
Clerk.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Now, Mr. Sullivan, reference was made this morning to a Sherwood sale at Riverside in which Mr. Estes said he acted as agent, and the Mission Riverside transaction at Santa Barbara, in which he stated he acted as one—was at least involved as one of the purchasers. Are you familiar with those transactions? A. I am.

Q. These documents that you have identified here—state whether or not those same documents, I mean as to form, were used in those transactions, those two previous transactions?

Mr. Wilson: Objected to as immaterial.

The Court: Sustained. I cannot see the materiality of it. No objection has been made to any form.

Mr. Mulliner: If I may say so after your Honor's ruling—

The Court: Yes.

Mr. Mulliner: —the theory of it is that these [120] transactions at least established knowledge on the part of one of the plaintiffs here as to these documents.

The Court: You mean as to their form and contents?

Mr. Mulliner: Yes.

The Court: There has never been any question raised at all that I have heard of in the case about the form or contents of the documents or any objection to them or anything else. I cannot see the materiality. It does not fit into either your defense, your special defense, or the plaintiffs' theory of the case.

Q. By Mr. Mulliner: I will ask you this, Mr. Sullivan, and don't answer until counsel has had a chance to object: I will ask you, if you know of your own knowledge, to state whether or not in those transactions there were payments put up as earnest money, as in the

(Testimony of F. E. Sullivan)

case that we have here, in both of the previous transactions?

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, and a conclusion of the witness.

The Court: Sustained.

Mr. Mulliner: In that connection, your Honor, I merely offer to show that the money in each of those other instances was applied upon the purchase price when the deal went through.

The Court: You are willing to do that here, aren't you? That is what your answer says.

Mr. Mulliner: Yes, we are willing to do that here, but I make that offer to prove this was just preliminary to that [121] offer. I assume counsel will object.

The Court: Objection sustained and the offer of proof denied.

Q. By Mr. Mulliner: Mr. Sullivan, I will ask you if at or near the time of your telephone call to Mr. Arthur, at the time you have fixed on May 8th, you made any other call reporting your conversation with Mr. Arthur?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: This is for the purpose of fixing the time, your Honor.

The Court: Overruled. Admitted for that limited purpose.

A. I believe I made three calls that day that I succeeded—I attempted to make several calls but could not, of course, get Mr. Estes, as I have already explained.

Q. By Mr. Mulliner: Let us just confine it. Did you call Mr. Carron?

A. Yes, I called Mr. Carron at San Diego.



(Testimony of F. E. Sullivan)

Q. When was that with relation to the time you talked to Mr. Arthur?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: This is for the purpose, as I stated, your Honor, of fixing the time.

The Court: Overruled and admitted for that limited [122] purpose.

A. It was about 2 o'clock in the afternoon.

Q. By Mr. Mulliner: Did you succeed in getting him? A. Yes, I did.

Q. And where was he at that time?

A. At his office in San Diego.

Q. And at that time did you say anything as to whether or not you had had a conversation with Mr. Arthur? A. I did.

Mr. Wilson: Wait just a minute. That is objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think I am not entitled to get the contents other than to identify it and identify the subject of it.

The Court: Objection sustained.

Q. By Mr. Mulliner: What was the subject of that conversation?

Mr. Wilson: The same objection.

The Court: Sustained.

Mr. Mulliner: You may cross examine.

The Court: Gentlemen, I see it is 4 o'clock. I dislike to recess this early, but in view of the fact that, while you are all from out of town, you have to be here tomorrow anyhow, it would be a matter of great convenience to me if I could recess now unless you have some

(Testimony of F. E. Sullivan)

witnesses you want to excuse and finish with them tonight. [123]

Mr. Mulliner: We have none.

The Court: Very well.

Mr. Mulliner: I made the same reservation with respect to Mr. Carron.

The Court: Very well. We will recess until 10 o'clock in the morning.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Thursday, January 11, 1945.) [124]

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Los Angeles, California, Thursday, January 11, 1945.  
10 a. m.

The Court: All right, proceed. You had finished with Mr. Sullivan?

Mr. Mulliner: There are a few matters I overlooked, your Honor.

F. E. SULLIVAN,  
recalled.

Direct Examination  
continued.

Mr. Mulliner: Mr. Wilson, I will ask you if you have the original of a telegram received by the defendants from the Salt Lake office in answer to the telegram introduced yesterday and made a part of Exhibit 2, I believe.

(The document was produced by Mr. Wilson.)

The Clerk: Defendant's G for identification.

Mr. Mulliner: Can we stipulate that G is the wire that I just referred to?

Mr. Wilson: Yes, subject to my objection to its introduction if you want to offer it.

(Testimony of F. E. Sullivan)

Mr. Mulliner: I am offering it. I was just getting the stipulation that it was the answer to the telegram of the plaintiffs.

Mr. Wilson: Yes.

Mr. Mulliner: I offer it, if your Honor please.

Mr. Wilson: I object to it as incompetent, irrelevant, and immaterial, hearsay, and no foundation laid for it.

Mr. Mulliner: It is a part of the same transaction. It [125] is just simply an answer to their telegram introduced yesterday.

The Court: Objection overruled. Admitted in evidence as Defendant's Exhibit G.

[DEFENDANT'S EXHIBIT G.]

WESTERN  
UNION  
A. N. Williams  
President

Class of Service  
This is a full-rate  
Telegram or Cable-  
gram unless its de-  
ferred character is in-  
dicated by a suitable  
symbol above or pre-  
ceding the address.

Symbols  
DL=Day Letter  
NL=Night Letter  
I.C=Deferred Cable  
NLT=Cable Night Letter  
Ship Radiogram

(02).

1944 May 9 PM 1 40

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination

(Defendant's Exhibit G)

PZS67. WUKH298 ((FIVE) 42=SALT LAKE CITY  
UTAH 9 152P

ALBERT C ARTHUR AND H B ESTES=  
(SAN BERNARDINO CALIF)=

ANSWER YOUR WIRE YOUR OFFER TO PUR-  
CHASE WAS ACCEPTED AND YOU WERE SO  
NOTIFIED PRIOR TO MAY FIRST. UNDER  
TERMS OF SAID OFFER CANNOT SEE WHY  
YOU ARE ENTITLED TO *EFUND* OF DEPOSIT.  
PLEASE ADVISE WHY YOU THINK YOU ARE  
SO ENTITLED=

WESTERN LOAN AND BUILDING COMPANY.

[Stamped on face]: [Not legible]

The Company Will Appreciate Suggestions From Its  
Patrons Concerning Its Service

Case No. 3815-PH Arthur, et al vs. West. Loan.  
Defts. Exhibit G. Date Jan. 11, 1945. No. G in Evi-  
dence. Clerk, U. S. District Court, Sou. Dist. of Calif.  
J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien,  
Clerk.

Mr. Mulliner: Do you have the original of the letter  
of Mr. Sullivan's written on the 9th to the defendants on  
the same matter?

(The document was produced by Mr. Wilson.)

The Court. It may be marked H. I suppose you offer  
that, and the same objection?

[DEFENDANT'S EXHIBIT H.]

Established 1892

[Crest]

WESTERN LOAN AND BUILDING COMPANY

45 East 1st South Street . . . Salt Lake City 12, Utah

May 9, 1944

A. A. Smith

President

R. D. Tobin

Vice President

C. J. Sumner

Vice President and

General Manager

R. B. Ritchie

Secretary & Treasurer

F. E. Sullivan

California Sales Manager

308 West Olympic Blvd.

Los Angeles 15, California

Mr. Albert C. Arthur

Fourth and E Streets

San Bernardino, California

Re: Norman Manor and  
Norman Manor An-  
nex Apartments

Mr. H. B. Estes

Mrs. Catherine Estes

439-24th Street

San Bernardino, California

Madam and Gentlemen:

This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April 24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor



(Defendant's Exhibit H)

Annex Apartments under the terms of your Offer to Purchase.

We have deposited with the Security Title Insurance and Guarantee Co., #480 Court Street, San Bernardino, California, the papers and documents necessary to complete the transfer.

You are respectfully reminded that according to the terms of your Offer to Purchase the closing date is May 15, 1944.

Very truly yours,

WESTERN LOAN and BUILDING CO.

By F. E. SULLIVAN

F. E. SULLIVAN

Calif. Sales Manager

Registered Mail

Return Receipt Requested

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit H. Date Jan. 11, 1945. No. H in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: Yes, the same objection.

The Court: The same ruling.

Mr. Mulliner: Can we stipulate in this connection—you have given me one original—that each of the plaintiffs received a copy of this letter on the 10th day of May, 1944, which is Exhibit H?

Mr. Wilson: So stipulated, subject to the objection stated, your Honor.

(Testimony of F. E. Sullivan)

The Court: All right.

Q. By Mr. Mulliner: Mr. Sullivan, yesterday I neglected to ask you with reference to May 8th—you stated that you attempted to get Mr. Estes and that you did get Mr. Arthur on the telephone on that date. Do you recall?

A. Yes, sir.

Q. I will ask you if later you got Mr. Estes on the telephone? [126]

A. Yes, I did.

Q. And what day was that?

A. That was the same day, May 8th.

Q. And can you tell us the time of day, about the time of day, when you were able to reach him?

A. It was after the close of business; I think about 5:30.

Q. And did you have a conversation with him with relation to this matter?

A. Yes, I did.

Q. State what that was.

Mr. Wilson: I object to it as incompetent, irrelevant, immaterial, and hearsay.

The Court: What is the purpose of this?

Mr. Mulliner: Well, it is on the same day, your Honor.

The Court: Does it show an admission against interest?

Mr. Mulliner: I will show the notification that we were ready to proceed and I will show that this was—

The Court: Overruled. You may answer.

A. Well, I advised Mr. Estes that I had talked to Mr. Arthur and explained to him that we had the papers there to close the sale and that Mr. Arthur had advised me that he was not going to complete it, he was not going through with it. I then asked Mr. Estes if he could give me a reason, as Mr. Arthur had not given me a satis-

(Testimony of F. E. Sullivan)

factory reason. Mr. Estes then remarked that Mr. Arthur had cooled off on the deal |127| because we had taken so much time. I think he used the words "monkeyed around."

Q. By Mr. Mulliner: State whether that conversation was before or after the receipt by you of the telegram Exhibit 2 or the letter or letters Exhibit 3.

A. That is the letters and telegrams advising that they were not going through with the deal?

Q. That is right.

A. That conversation took place before I had received them.

Q. Now, calling your attention to April, while Mr. Carron was there, I will ask you if you were present in the office here in Los Angeles, your office, when Mr. Carron placed a call to either of the plaintiffs.

A. I was.

Q. And have you any way of fixing that date definitely?     A. I have.

Q. What is that?

A. I received a letter from my general manager accepting the offer that day.

Q. Let me hand you your file. See if you can find that letter for us.

A. (Producing) That is the letter there, written on April 22nd.

The Clerk: Defendant's I for identification.

Q. By Mr. Mulliner: You have handed me now a letter |128| marked I for identification. Is this the letter that you just referred to?     A. Yes, it is.

The Court: Just a moment.

(The document was handed to Mr. Wilson.)

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: That letter purports to be dated, Mr. Sullivan, April 22, 1944? A. Yes.

Q. And when was it received in your office?

A. It was received in our office Monday morning, April 24th.

Mr. Mulliner: We offer Exhibit I, your Honor.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and hearsay and—

Mr. Mulliner: Before I press the offer—

Mr. Wilson: And that no foundation has been laid for it.

Mr. Mulliner: —let me lay a little further foundation.

Q. By Mr. Mulliner: Who was that letter signed by? Do you know the signature?

A. C. J. Sumner, who was general manager of the company. He is also executive vice president and my final executive authority on all sales.

Q. Is that a part of your records and files in your office?

A. That is a part of my record and my file. [129]

Q. And you are producing it from your file?

A. That is correct.

Mr. Mulliner: I now press the offer, your Honor, in view of the fact that the plaintiffs have testified here that they were told that the authority would come and would have to come from Salt Lake, and I think perhaps it comes under public records statute with relation to the hearsay rule in this state also.

The Court: What public records statute?

Mr. Mulliner: The business records statute.

The Court: You mean the presumption that the ordinary course of business has been followed?

Mr. Mulliner: Yes.

(Testimony of F. E. Sullivan)

Mr. Wilson: I make the same objection, your Honor.

The Court: I don't think it does. The objection is sustained. No foundation laid; hearsay. You may leave it there with the clerk, marked for identification.

Mr. Mulliner: Yes. I was wondering about your Honor's ruling as to the foundation. That does not go to the sufficiency of the identification or the signature?

The Court: Oh, no. It is lacking in foundation because there is no connection between it and the plaintiffs.

Mr. Mulliner: You see, I presented it, your Honor, because they had stated that authority had to come from Salt Lake.

The Court: I understand. [130]

Mr. Mulliner: I am presenting this as the authority coming from Salt Lake.

The Court: Very well.

Q. By Mr. Mulliner: At that time what was done by Mr. Carron, if anything—

A. Well, I—

Mr. Wilson: Wait—

Q. By Mr. Mulliner: —with relation to the plaintiffs here?

Mr. Wilson: Wait just a minute. That is objected to on the ground it is incompetent, irrelevant, immaterial, and hearsay, and not the best evidence, and, furthermore, that no foundation has been laid for it. These objections, your Honor, were previously made to the same subject matter which was covered by Mr. Carron's testimony, if I remember correctly, with respect to this same related oral notification.

Mr. Mulliner: If that is the basis, we submit it, your Honor.

The Court: What was that?



(Testimony of F. E. Sullivan)

Mr. Mulliner: I say, if that is—counsel says it goes simply to the oral notice rather than a written notice. I say, if that is it, we will submit the objection without any argument.

The Court: Well, the question is, what was done by Mr. Carron?

Mr. Mulliner: In this witness' presence. [131]

The Court: Oh. Overruled.

A. Mr. Carron placed a call for Mr. Arthur in San Bernardino.

Q. By Mr. Mulliner: Now, did you listen to the conversation at that time, Mr. Sullivan, or any part of it?

A. I heard him congratulate Mr. Arthur.

Mr. Wilson: I move to strike the answer, your Honor, on the grounds it is not responsive.

The Court: State your objection as the basis of a motion to strike.

Mr. Wilson: Your Honor, I move to strike out the answer on the ground it is not responsive to the question and that it was given before an opportunity was afforded to object thereto.

The Court: What is your objection to the question?

Mr. Wilson: The objection is that—

The Court: Hearsay?

Mr. Wilson: It is incompetent, irrelevant, immaterial, hearsay, and no foundation has been laid for it.

Mr. Mulliner: What I am attempting to show, your Honor, is that he listened to a part of the conversation that Mr. Carron has already testified to.

The Court: Objection sustained. The answer is stricken.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Where were you, Mr. Sullivan, when this call was placed?

A. I was in the office. [132]

Q. Well, in what office?     A. Mr. Carron's office.

Q. Was he present there?     A. Yes.

Q. At the telephone?     A. Yes.

Q. And did you remain there during the whole conversation?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Mulliner: I just want to make my record.

The Court: Very well. Go right ahead.

Mr. Mulliner: I think the *witness' might* possibly be interpreted as a conclusion, so I will ask him again:

Q. By Mr. Mulliner: Did you hear a part of the conversation or purported conversation?     A. Yes.

Mr. Wilson: The same objection.

Q. By Mr. Mulliner: At that time?     A. Yes.

Mr. Wilson: Pardon me, your Honor. I want to make the same objection but I have not had an opportunity to make it.

The Court: The answer may be stricken for the purpose of making the objection.

Mr. Wilson: Objected to as incompetent, irrelevant, [133] immaterial, hearsay, and no foundation laid for it.

The Court: The objection is overruled. The question is, Did you hear a part of the conversation?

A. Yes.

Q. By Mr. Mulliner: And that part, I assume, was what Mr. Carron said or something that he said?

A. Yes.

(Testimony of F. E. Sullivan)

Q. Will you state what you heard him say in that conversation?

Mr. Wilson: The same objection.

The Court: Sustained.

Q. By Mr. Mulliner: I call your attention now, Mr. Sullivan, to a provision in this contract, Exhibit 1:

"\* \* \* that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had, that some time and a substantial expense will be required, and that the exact loss and expense to Owner cannot be determined. To cover such, a deposit as stated below is agreed upon and settled—" I thought there was stated something in here about the loss of sales, sales that may be lost.

"The undersigned Offerer understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner."

You are familiar, of course, with that provision?

A. Yes. [134]

Q. Now, when this offer was received, and pending the closing, did you continue or discontinue any efforts to sell this property?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. By Mr. Mulliner: Or did you discontinue showing the property?

Mr. Wilson: The same objection.

The Court: The same ruling.

Mr. Mulliner: Your Honor, I am just—

The Court: Laying your foundation and making your record. Go right ahead and make it.

(Testimony of F. E. Sullivan)

Mr. Mulliner: That is all I am doing, as your Honor recognizes.

The Court: That is all right. I practiced law a long time.

Mr. Mulliner: It perhaps comes within your Honor's ruling, but I want to show by this witness that in this area where there are war activities the elements that enter into the demand and the market are the war conditions, that with the war going on this class of property is completely filled so far as occupancy is concerned and there is no competitive building of other apartment houses, so that there are demands that come in and go out, and in that connection that we cease all efforts to sell the property to anybody else and simply [135] tie it up, and that we made no effort to sell it during this interval and for some time after May 10th, and that we have been unable since to sell it or procure a similar offer because of market conditions. I offer that proof.

Mr. Wilson: To which we object on the ground it is incompetent, irrelevant, and immaterial.

The Court: The objection is sustained.

Mr. Mulliner: We save an exception.

Q. By Mr. Mulliner: Mr. Sullivan, did you have any commission coming out of this transaction in any way?

Mr. Wilson: The same objection.

Mr. Mulliner: The question of commission was discussed yesterday, commissions to Mr. Estes.

The Court: What difference does it make if Mr. Sullivan has a commission?

Mr. Mulliner: I am just asking—

Q. By Mr. Mulliner: Were you on a salary or on a commission basis?     A. A straight salary.

(Testimony of F. E. Sullivan)

Q. You had no interest so far as any commission is concerned whether this property was sold?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think perhaps his other answer covers it.

The Court: I think it does. The objection is sustained. [136]

Q. By Mr. Mulliner: I will ask you, as sales manager of this company, to state whether or not you and the company are ready, willing, and able to go through with this deal and have you always been so ready and willing.

Mr. Wilson: Wait just a minute, Mr. Sullivan. Are you finished, Mr. Mulliner?

Mr. Mulliner: Yes.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and upon the ground it is not the best evidence, that there is no foundation laid for it, that it is hearsay and the conclusion of the witness.

The Court: I think he can answer if he knows.

A. I am sure that the company would—

The Court: The objection is overruled. Do you know whether or not—

The Witness: I know that they would complete the sale if they would comply with their part.

Q. By Mr. Mulliner: And you know that they always have been willing to do that?

Mr. Wilson: The same objection, your Honor.

The Court: The same ruling. Overruled.

A. That is right, they have always been ready to complete the sale.

The Clerk: J for identification.



[DEFENDANT'S EXHIBIT J

FOR IDENTIFICATION]

Earl Warren

Governor

Sacramento Office

Business and Professions Building

[Crest]

STATE OF CALIFORNIA  
DIVISION OF REAL ESTATE

Hubert B. Scudder, Commissioner

April 21, 1944

Mr. C. J. Sumner

Vice Pres. and Gen. Mgr.

Western Loan and Building Co.

45 East 1st South St.

Salt Lake City, Utah

Dear friend Chris:

In Re: Norman Manor and Norman Manor Annex.

I have your advices to the effect that you have an offer of \$86,750 for the above apartment house in San Bernardino, with \$21,000 down payment and the balance in terms.

I believe this to be an advantageous offer and herewith advise you of my approval of this sale.

Sincerely yours

H. B. Scudder

HUBERT B. SCUDDER

HBS:MP

[Written in ink]: C. J. Sumner.

[Stamped]: Rec'd. 12:45 Apr 24 1944 Western Loan  
& Bldg. Co.

(Defendant's Exhibits J)

Case No. 3815-PH. Arthur, et al. vs. West Loan. Defts. Exhibit J. Date Jan. 11, 1945. No. J Identification. Clerk U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

The Court: What is that?

Mr. Mulliner: It is a letter signed by H. B. Scudder, [137] your Honor.

Q. By Mr. Mulliner: Who is H. B. Scudder?

A. H. B. Scudder is a director in the company and he is also California Real Estate Commissioner.

Q. So far as this company is concerned?

A. He is a director, a California director.

Q. This letter is from the records and files of the company, is it not?

A. That was sent directly to Salt Lake by Mr. Scudder.

Q. It comes out of the records—

Mr. Wilson: Pardon me, your Honor. I have a little difficulty hearing Mr. Sullivan. Will you speak a little louder?

The Witness: Yes, I will. This is a letter that was sent by Mr. Scudder to the general manager, Mr. C. J. Sumner, Salt Lake City, Utah.

Q. By Mr. Mulliner: Is the signature at the bottom Mr. Sumner's signature?

A. That is Mr. Sumner's signature.

Q. Are you familiar with the signature of H. B. Scudder? A. I am.

(Testimony of F. E. Sullivan)

Q. Have you seen him sign it on other occasions?

A. On several occasions.

Q. State whether or not that is his signature on Exhibit J. [138]

A. That is Mr. Scudder's signature.

Mr Mulliner: This is a further offer, I may say to your Honor, in connection with this recital in the contract as to what we would do and be required to do—

The Court: On liquidated damages?

Mr. Mulliner: By getting an official approval, and so forth, and I make a further offer of this letter at this time in that connection.

Mr. Wilson: I object to it.

Mr. Mulliner: I offered yesterday the information as to the appraisers.

Mr. Wilson: Objected to on the grounds it is incompetent, irrelevant, immaterial, hearsay, and no foundation laid for it.

The Court: Sustained. It may be marked for identification.

Mr. Mulliner: I think you may cross examine.

#### Cross-Examination

Q. By Mr. Wilson: During the month of April, 1944—

The Court: Mr. Wilson, we can all hear you better if you use that lectern.

Mr. Wilson: Your Honor, this wind over here carries the voice of the witness away from us.

(Testimony of F. E. Sullivan)

The Court: For that reason, if you stand there the witness will talk loud enough for you to hear him.

Mr. Wilson: If he will. [139]

Q. By Mr. Wilson: During the month of April, 1944, who comprised the Executive Committee of the defendant company, Mr. Sullivan?

A. One member is the general manager of the company, C. J. Sumner. I don't know who the other two members are at the present time.

The Court: Well, at the present time? Did you know in April, 1944?

The Witness: No, I did not.

Mr. Mulliner: I did not get an objection in there, your Honor, but this is apparently cross examination on excluded matters and I therefore ask that it be stricken as incompetent, irrelevant, and immaterial, and not proper cross examination.

The Court: Let me see Exhibit 1. (After examining) Overruled.

Q. By Mr. Wilson: Do you know who comprised the members of that committee during the month of May, 1944?

Mr. Mulliner: Now, I will make the objection, your Honor, that it is incompetent, irrelevant, and immaterial, and no proper cross examination, because all of our offers with relation to that provision of the contract were excluded.

The Court: You offered them in relation to liquidated damages and I sustained the objections for the reasons

(Testimony of F. E. Sullivan)

which I attempted to indicate yesterday with relation to that. You have examined this witness concerning Exhibit 1, however. Now, [140] it says that it will cause an examination by its Executive Committee to be had. In reading the contract it would be the logical conclusion that before an offer would be accepted an examination by the Executive Committee would have to be had. For that reason I am permitting this cross examination as being cross examination on the subject of whether or not there was an acceptance, not upon the subject of whether there was or was not liquidated damages.

Mr. Mulliner: I see that, your Honor, but I don't want to limit my offer to the question of liquidated damages. I didn't so limit it in making it. I offered it in connection with, as I said, the provisions of the contract.

The Court: Well, I think perhaps, then, in that event that I was in error in excluding your Exhibit I which was the—was Mr. Scudder a member of the Executive Committee?

The Witness: Not to my knowledge.

Mr. Mulliner: You mean by that you don't know?

The Witness: I don't know.

The Court: Then I was in error in excluding Exhibit I and I will reverse myself on that and admit Exhibit I in evidence, not to the question of liquidated damages, but limited solely to the question of acceptance.



[DEFENDANT'S EXHIBIT I]

WESTERN LOAN AND BUILDING COMPANY

Inter-Office Stationery

Home Office

To Mr. F. E. Sullivan, California Sales Manager  
Los Angeles

From Mr. C. J. Sumner, General Manager

Date April 22, 1944

Subject RE 4427-4430

Norman Manor & Annex

Dear Mr. Sullivan:

Sale of the above properties as outlined in your letter of April 5th is approved.

Enclosed is analysis of operations.

Closing papers will be prepared as soon as you forward the necessary papers to prepare them.

Your very truly,

C. J. Sumner  
General Manager

CJS:ek

Enc

(Defendant's Exhibit I)

WESTERN LOAN AND BUILDING COMPANY  
Inter-Office Stationery  
Oakland Real Estate Sales

To        Mr. C. J. Sumner, General Manager

From     Mr. F. E. Sullivan, California Sales Manager

Date    April 5, 1944

Subject

R.E. 4427 Norman Manor Apts.

R.E. 4430 Norman Manor Annex

San Bernardino, California

Dear Mr. Sumner:

This will advise you that we hold an offer to purchase the above properties, adjoining buildings, on the following terms:

Sale price:     \$86,750.00

Cash:            21,000.00

Balance of     65,750.00 to be paid at rate of \$591.75 per month including 6% interest. Purchasers to have the privilege of paying additional principal payments of \$4,931.25 in any one calendar year and the entire balance due at the end of 120 months.

We hold a 5% deposit in the amount of \$4,337.50.

The purchasers are Mr. Albert C. Arthur and H. B. and Catherine Estes.

Mr. H. B. Estes is also the broker in the transaction and will receive \$4,000.00 commission from the closing escrow.

The offer was increased over an original offer of \$85,000.00 to allow for the additional commission and

(Defendant's Exhibit I)

to permit Mr. Estes to participate as buyer. Mr. Arthur, a San Bernardino jeweler, is undoubtedly supplying most of the cash payment, but he and Mr. Estes are associated as owners of other properties, Mr. Estes attending to their operation.

We have contacted these people many times and as the offer represents all the property is worth on the present market we are ordering the independent appraisals by Messrs. Saint and Schmutz. If Mr. Schmutz is not available we will submit the offer with only one appraisal.

We will keep you advised.

Very truly yours,

F. E. Sullivan

California Sales Manager

FES:JW

[Stamped]: Received 8:30 Apr 8 1944 Western Loan & Bldg. Co.

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit I. Date Jan. 11, 1945. No. I in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Mulliner: Does that ruling also go to the Scudder letter, your Honor?

The Court: No.

Mr. Wilson: May we have the last question read?

[141] (Question read.) A. No.

(Testimony of F. E. Sullivan)

Q. By Mr. Wilson: You stated yesterday, I believe, that at some time on May 8th or May 9th, 1944, you got hold of Mr. Arthur on the telephone?

A. That is correct, May 8th.

Q. May 8th? And at that time Mr. Arthur said to you, didn't you know that he was not going through with the deal?

A. Yes, he did.

Q. Didn't he tell you that a telegram had been sent to you so informing you?

A. Yes.

Q. Had the telegram been received by you or had you been aware of its contents when you telephoned Mr. Arthur?

A. No, sir.

Q. The next day you say you brought some papers down to the Security Title Company?

A. That is correct.

Q. You did it personally?

A. Personally.

Q. Did you go over on the—did you go about a block away, to Mr. Arthur's store, to see if he was there?

A. No.

Q. Did you get in touch with him at all?

A. No.

Q. Nor Mr. Estes? [142]

A. I contacted Mr. Estes on the 10th.

Q. I am speaking now of the 9th.

A. I did not contact either of them on the 9th.

Q. When was it that you arrived in San Bernardino with the papers and delivered them to the Title Company, Mr. Sullivan?

A. Approximately 4 o'clock in the afternoon.

Q. When was it you wrote the letter which we have here as Exhibit H?

A. That was written in the morning.

(Testimony of F. E. Sullivan)

Q. Written before you came to San Bernardino?

A. Yes.

Q. When you wrote that letter had you received information respecting the contents of the telegram of May 8th?

A. It was read to me by an operator or someone at the Western Union over the telephone.

Q. Then you did know?

A. I did on the 9th, yes, but not on the 8th.

Q. I mean, you did know before you wrote the letter that the telegram had been received revoking the offer?

A. Yes.

Mr. Wilson: No other questions, your Honor.

The Court: Step down.

Mr. Mulliner: Just a minute, Mr. Sullivan.

#### Redirect Examination

Q. By Mr. Mulliner: On this question of approvals in [143] Salt Lake by the Executive Committee or other persons there, was that handled by you?

A. No, sir.

Q. What was your authority or information with relation to that?

A. My authority and instructions and information were to submit these offers to the general manager, Mr. C. J. Sumner.

Q. And where did you receive your authority from to proceed with the closing of the sale?

A. From Mr. C. J. Sumner.

Q. How long had that procedure been going on?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.



(Testimony of F. E. Sullivan)

Mr. Mulliner: I can show authority, your Honor, by a course of procedure and dealings, and so could these people if any question came up on this man's authority to put these papers in escrow.

Mr. Wilson: If your Honor please, may I be heard?

The Court: I think that is aside from the other question of the Executive Committee. Of course, this agreement is not signed by the Western Building & Loan. They could not compel them to get an appraisal by the Executive Committee, but that is the representation that is made in their printed form which they furnished.

What is the question again, Mr. Reporter? Will you [144] read it?            (Question read.)

The Court: Overruled.

A. For 10 years, to my knowledge.

Q. By Mr. Mulliner: And approximately how many sales had that procedure gone on in connection with?

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial.

The Court: You mean, how many sales in California?

Mr. Mulliner: Yes.

The Court: Overruled. I doubt its materiality but I will let it in.

A. I would say at least 500.

Q. The final authority for the escrow papers came from Mr. Sumner?

Mr. Wilson: Wait just a minute, please. That is objected to on the ground it is incompetent, irrelevant, immaterial, and no foundation has been laid for it.

The Court: That is according to your previous testimony?

The Witness: Yes.

(Testimony of F. E. Sullivan)

The Court: And the authority to you, that is what you acted on?

The Witness: Yes, sir.

The Court: The objection is overruled.

Q. By Mr. Mulliner: And communicated substantially as in Exhibit I? [145]

Mr. Wilson: The same objection.

Q. By Mr. Mulliner: Was that according to your custom and practice over these years?

The Court: Overruled.

A. Yes.

Q. By Mr. Mulliner: Did that cover sales also in San Bernardino? A. Yes.

Q. And also sales in which Mr. Estes was agent or purchaser?

Mr. Wilson: The same objection.

The Court: The same ruling.

A. Yes.

Q. By Mr. Mulliner: These that have been referred to? A. Yes.

The Court: Did you ever show Exhibit I to Mr. Estes or Mr. Arthur?

The Witness: I did not. Pardon me. That is I? No, sir.

The Court: Were you ever present when it was exhibited to them by anybody?

The Witness: No, sir.

The Court: Did you ever read it to them?

The Witness: No, sir. When I received this letter I turned it over to Mr. Carron, who had been handling the deal, and told him to communicate the information to them. [146]

(Testimony of F. E. Sullivan)

The Court: All right.

Q. By Mr. Mulliner: You said you turned the letter over to Mr. Carron. When was that?

A. That was on April 24th.

Q. Was that at the time you said he placed the call?

A. Yes.

Mr. Mulliner: I believe that is all with this witness.

Mr. Wilson: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: Mr. Carron, will you take the stand?

### JAMES CARRON,

recalled as a witness in behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

#### Further Direct Examination

Q. By Mr. Mulliner: Mr. Carron, I neglected to ask you when you were on the stand the other day—you testified to the taking of this inventory, you recall, at San Bernardino?     A. Yes, sir.

Q. And you testified to the signing of the inventory by Mr. Estes and Mr. Arthur?     A. Yes.

Q. Where was that signed?

A. Mr. Estes signed it at the building, in the lobby of the apartment house. Mr. Arthur signed it at his jewelry store. [147]

Q. Now, with relation to the signing of Exhibit 1, where did you say Exhibit 1 was signed? Exhibit 1 is the offer to purchase, Exhibits 1 and 6, they are different copies of the same instrument.

(Testimony of James Carron)

A. The offer to purchase, Exhibit 1, was signed in the lobby of the California Hotel.

Q. On what date?

The Court: You have covered that before. It has been asked and answered.

A. On April 1st.

Mr. Mulliner: It was just preliminary, your Honor.

Q. By Mr. Mulliner: Now I will ask you if Mr. Sullivan was there at that time.

A. Mr. Sullivan was not there.

Q. Either at the signing or any of the discussions on that day with relation to the transaction?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: It was asked and answered before. You asked him that when you had him on the witness stand before and he said he was there alone.

Mr. Mulliner: I believe not as to whether Mr. Sullivan was there. I overlooked that. I asked Mr. Sullivan if he was there.

The Court: Objection overruled.

A. Mr. Sullivan was not there. [148]

Q. By Mr. Mulliner: So far as you know, was Mr. Sullivan present at any discussion with either of these fellows at any time during the month of April?

A. Not to my knowledge.

Q. I will ask you now—I believe you stated that after you left the employ of this company you went to—

A. San Diego.

Q. —San Diego? A. Yes, sir.

Q. I will ask you if in May and after you went to San Diego you received a telephone call—whether or not you received a telephone call from Mr. Sullivan with relation to a telephone discussion that he had had with Mr. Arthur.

(Testimony of James Carron)

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Mulliner: This, your Honor, is the same one. I am fixing the time on the 8th, the time with relation to our tender of these documents.

The Court: It is merely cumulative to show the date of the 8th.

Mr. Mulliner: It will also show the hour of the day.

The Court: That is the only purpose for which it is offered?

Mr. Mulliner: That is the only purpose and it may be limited to that. [149]

The Court: Overruled. You may answer.

The Witness: What was the question?

(Question read.)

A. I did.

Q. By Mr. Mulliner: Now, can you tell us the day?

A. I can give you the date. It was May 8th.

Q. And can you tell us the time of the day?

A. Approximately 2 o'clock in the afternoon.

Q. Showing you now Exhibit I, I will ask you if you have ever seen that before?

A. (After examining) Yes, I have.

Q. When did you first see it?

A. On the morning of April 24th.

Q. And was that before or after you placed the call to Mr. Arthur that you have testified about here?

A. It would have to be before because—

Mr. Wilson: Just a minute.



(Testimony of James Carron)

The Court: That may be stricken.

Q. By Mr. Mulliner: I just asked you—

The Court: Do you remember?

Q. By Mr. Mulliner: —if it was before or after.

A. It was before.

Q. State whether or not Mr. Sullivan was there at that time? A. Mr. Sullivan was there.

Q. In the office here in Los Angeles? [150]

A. Mr. Sullivan was there.

Q. I will ask you, Mr. Carron, whether there had been any written correspondence passed between the company or the company office here, the defendants, and these plaintiffs or either of them with relation to this transaction up until the time you left?

A. Nothing in writing that I know of.

Q. Were you receiving any commission on this deal if it had been completed or were you on a salary basis?

Mr. Wilson: Objected to.

The Court: It is immaterial. You don't have to disprove any bias or interest or prejudice. The witness is presumed to speak the truth.

Mr. Mulliner: I think that is all with this witness, Mr. Wilson, but before I sit down—well, I will let you cross examine.

Mr. Wilson: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: This is a matter, your Honor, that I am simply making a record on.

The Court: All right.

Mr. Mulliner: Your Honor has ruled on it, but I offer to prove by Mr. Sullivan, who is here and has been sworn, that on both the Sherwood Melvin deal, handled by Mr. Estes, and the Mission Riverside deal, also handled by him, and in which [151] he was a purchaser, that the deposit, the earnest money deposit such as we have involved in this action, was applied upon the purchase price of those properties. I offer that as bearing upon a practical interpretation of this offer to purchase by at least one of the parties plaintiff here.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Sustained.

Mr. Mulliner: I offer in that connection also to prove that the inventory in each of those instances was taken as it was taken here, as we contend, after notification of the acceptance from Salt Lake.

Mr. Wilson: The same objection.

The Court: Sustained.

Mr. Mulliner: We rest, your Honor.

Mr. Wilson: Do we have a morning recess?

The Court: I don't care. Do you want one?

Mr. Wilson: About five minutes.

The Court: All right. The court will be in recess.

(Short recess.)

Mr. Wilson: Mr. Estes.

H. B. ESTES,

called as a witness for the plaintiffs in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

[152]

Q. By Mr. Wilson: Mr. Estes, during the time the negotiations or conversations which preceded the signing of this offer on April 1, 1944, at the California Hotel, was there any discussion about an inventory?

Mr. Mulliner: Was that at the time of the signing?

Mr. Wilson: Yes.

A. Previous to it, you said?

Q. By Mr. Wilson: Yes; not previous in the sense of the previous day, but previous to the signing on the same day. A. On the occasion of the signing?

Q. That is right.

A. You mean at the meeting at the California Hotel?

Q. At the California Hotel April 1st.

The Witness: May I hear the question again?

(The question was read as follows:

“Q. Mr. Estes, during the time the negotiations or conversations which preceded the signing of this offer on April 1, 1944, at the California Hotel, was there any discussion about an inventory?”)

A. Yes.

Q. By Mr. Wilson: What was said at that time and by whom relative to the subject of an inventory?

A. The representative, I don't remember which one, or both, stated that an inventory and an appraisal of the apartment house would have to be taken and that they would let us know when it would be convenient to take that inventory and [153] have the property appraised.

(Testimony of H. B. Estes)

Q. I can't hear you.

A. They said they would let us know when it would be convenient to take an inventory and to have the property appraised.

Q. Is that all that was said about the inventory on that occasion?

A. They said an inventory would have to be taken before it could be approved at Salt Lake.

Q. Anything further?

Mr. Mulliner: May I have that answer read?

Answer read.)

Q. By Mr. Wilson: Anything further?

A. They also stated that the property would have to be appraised.

Q. I am referring now particularly to the subject of the inventory. What was said at the time and place that I have resigned relative to the subject of the inventory? We don't want to go over the other matters that were discussed. So far as the conversation had to do with the subject of the inventory, just relate what was said and by whom, if anything further was said.

A. They said they would let us know when it would be convenient to take an inventory.

Q. Have you stated the full conversation so far as it had a bearing on that subject? [154]

A. Yes, I think so.

Q. By "they" referred to in these answers of yours, to whom do you refer?

A. Well, either Mr. Carron or Mr. Sullivan or both of them. I don't know who was there. I don't remember which representative was there or if they were both there.

(Testimony of H. B. Estes)

Q. Well, it was one or the other or both?

A. That is right.

Q. Of these two men you have named?

A. Yes, sir.

Q. Subsequent to April 1, 1944, was this subject, speaking now of the subject of taking the inventory, discussed by you with either or both of these gentlemen whom you have named?

Mr. Mulliner: You mean prior to April 1st?

Mr. Wilson: No, subsequent.

A. I can't—I have this deal confused with other deals and I don't remember that point.

Q. By Mr. Wilson: Well, there was an inventory taken, it appears, sometime about the 25th of April?

A. Oh, yes, sir.

Q. And you had a part in that? A. Yes, sir.

Q. Now, before the actual taking of the inventory, between April 1st and April 25th did you have a discussion with either Mr. Carron or Mr. Sullivan about the taking of [155] this inventory of this property?

A. The day that we took the inventory we had a discussion before the inventory was taken.

Q. I said, between the two dates, April 1st and April 25th, was there any discussion?

A. I don't remember.

Q. You don't recall? A. No.

Q. During the taking of the inventory—strike that, please.

Do you remember the days upon which the inventory was taken?

A. I don't remember the exact dates, no, sir.

The Court: Well, it was taken April 25th, according to the testimony and according to the signature there.



(Testimony of H. B. Estes)

Now, he wants to know if there was any discussion during that time.

The Witness: We discussed the inventory the day the inventory was taken.

Q. By Mr. Wilson: With whom?

A. With the representative.

Q. Who was he?

A. I think it was either Mr. Carron or Mr. Sullivan.

Q. Who helped you take the inventory?

A. Either the—I think it was Mr. Carron.

Q. What was said, if anything, during the taking of the inventory, during the days of April 25th and 26th, by Mr. [156] Carron relative to the subject of the inventory?

A. Well, the morning that we took the inventory we had some soft drinks over at the Carnation.

Q. Let us get down to the inventory.

The Court: He wants to know what was said. Did you say anything at all or did you just go around silently?

The Witness: Well, we just checked all the articles in the apartment house.

Q. By Mr. Wilson: Was anything said about the inventory other than that?

A. Just in a general way.

The Court: Did anybody say anything about having to get the inventory approved by Salt Lake? That is apparently what counsel is driving at.

The Witness: Yes, sir.

Mr. Mulliner: I think that is leading.

The Court: Yes, it is leading, but in the interest of saving time I will exercise my discretion and permit my own leading questions.

(Testimony of H. B. Estes)

Q. By Mr. Wilson: May I have the answer, please?

A. Yes, sir.

Mr. Wilson: You may cross examine.

The Court: What was said?

The Witness: They said that Salt Lake would have to approve the inventory before they could approve the deal, I mean, the inventory would have to be approved before they [157] could approve the deal.

The Court: All right. Cross examine.

Cross-Examination

Q. By Mr. Mulliner: Mr. Estes, you said that whoever was there purporting to represent the company said on April 1st that the inventory would have to be approved at Salt Lake? A. Yes, sir.

Q. You are not sure who said that?

A. No, sir, because I am not sure whether Mr. Carron or Mr. Sullivan was representing the company.

Q. There wasn't any mention in the agreement that you signed at that time of taking an inventory, was there?

A. Will you repeat the question, please?

Q. In this agreement that you signed up, this offer to purchase, there wasn't anything said about taking the inventory, was there? A. Not in the escrow.

Q. You don't mean escrow? You mean offer to purchase? A. That is right, the offer to purchase.

Q. After it was signed up, I believe you called up Mr. Carron a time or two, didn't you, to ask him if the deal had been closed or—pardon me. Strike that last part.—to ask him if acceptance had been received from Salt Lake? A. Yes, sir.

Q. Or something to that effect? A. Yes, sir.  
[158]

(Testimony of H. B. Estes)

Q. When did you call him after April 1st?

A. Oh, it might have been a week or maybe 10 days.

Q. And what did you say to him?

A. I asked him if he had heard from Salt Lake and if the deal had been approved.

Q. When did you call him again?

A. Well, a short time after that.

Q. A week or such a matter?

A. It could have been.

Q. What did you say to him then?

A. I asked him the same thing, if the deal had been approved by Salt Lake.

Q. Did you call him again before the 25th?

A. I don't know.

Q. But at least those two times?

A. I think so. I think it was twice.

Q. Now, you didn't say to him at that time, "Let's get busy and take the inventory," did you, "so that Salt Lake will approve this"? A. No, sir.

Q. When you called him up and asked him if Salt Lake had approved it, you thought it might have been approved by Salt Lake, is that correct?

A. Well, I don't know if those telephone calls were before or after we had taken the inventory.

Q. I am just talking about the two calls that you said. [159] one about a week after April 1st and one about a week after that.

A. I think those calls were all made after the inventory was taken.

Q. Well, you want to change your previous testimony?

A. Yes, sir, I think so. Yes, sir.

(Testimony of H. B. Estes)

Q. You did not call him up at any time between April 1st and April 25th to ask him whether the deal has been closed or whether Salt Lake had approved the deal?

A. No, sir, I don't think so.

Q. You think you were wrong about that?

A. Yes.

Q. Now, you have already testified that you had two other deals here? A. Yes, sir.

Q. Don't you know, as a matter of fact, that the inventory was taken in both of those apartment house deals after the acceptance by Salt Lake?

Mr. Wilson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Mulliner: I think it is proper cross examination, your Honor, under the procedure.

The Court: Overruled. You may answer the question.

A. I don't remember how those were handled because they were about a year apart, a year before this deal.

Q. By Mr. Mulliner: You wouldn't say that the inventory [160] was not taken after the acceptance, would you?

A. The way I remember it, we took the inventory and then the escrow papers were brought up from Los Angeles.

Q. Yes. Now, the inventory is incorporated in the chattel mortgage and that is a part of the escrow, isn't it? A. Yes, sir.

Q. And that was true of all your transactions with this company? A. Yes, sir.

Q. And you have to have an inventory for that purpose? A. Yes, sir.

(Testimony of H. B. Estes)

Q. In order to list the properties in the chattel mortgage which is given back as partial security for the payment of the note?     A. Yes, sir.

Q. And that is the purpose in taking it, isn't it?

Mr. Wilson: That is objected to as immaterial and a conclusion of the witness.

The Court: Sustained.

Mr. Mulliner: I didn't hear you, your Honor.

The Court: Sustained. The objection is sustained. The purpose of taking it calls for a conclusion of the witness.

Mr. Mulliner: I thought I could ask that on cross examination, your Honor.

The Court: Well, if you press the point you can insist on an answer, but what difference does it make? Everybody [161] knows that is the purpose in taking an inventory. You have got to have an inventory to have a chattel mortgage.

Q. By Mr. Mulliner: What he really told you, Mr. Estes, was that these papers that went into the escrow were made up in Salt Lake, didn't he, and that they would come from Salt Lake?

A. He told me that the approval would have to come from Salt Lake. I don't know where the papers were made up.

Q. He told you that the escrow papers had to come from Salt Lake, didn't he?

A. No, sir, I don't think he did.

Q. This deposition that we have referred to that you gave in this matter in September, 1944, do you recall that at that time you testified that—

The Court: Show it to him first, counsel.



(Testimony of H. B. Estes)

Q. By Mr. Mulliner: Look at page 6, if you will, Mr. Estes, of that.

Mr. Wilson: What line?

Q. By Mr. Mulliner: Look at line 17. Now, did you testify at that time with relation to these calls to the office of the defendant after this document was signed on April 1st, beginning at line 17:

"Q. And if you made two calls, perhaps another 10 days would intervene?

"A. Yes, maybe a week or something like that."

That is your answer, "Yes, maybe a week or something [162] like that." That purports to be your answer? A. Yes, sir.

Q. (Reading):

"Q. And on the first of those calls, if there were more than one, what answer did you get from Carron or Sullivan?

"A. That they were still waiting for an answer from Salt Lake."

A. Yes, sir.

Q. You did so testify, did you not?

A. Yes, sir.

Q. Now, was that a fact? A. Yes, sir.

Q. That you did make those calls in that interval?

A. Yes, sir.

Q. Between April 1st and April 25th? Look up at line 4 there where your attention is called to the date.

A. Yes, sir.

Q. Is your testimony as I read it to you correct, that you made those calls after April 1st and before the inventory was taken?

A. It is not clear to me now when I did make the calls. I know I made two calls and maybe more but I

(Testimony of H. B. Estes)

don't remember what dates. I have had so many calls to them that it is rather confusing to place them with any certain dates.

Q. I call your attention on page 5 to line 21:

"Q. In other words, any of the details or arrangements [163] which affected the sale such as the escrow, the inventory and things of that nature, you have related them all?

"A. Well, he said after the inventory would be taken then Salt Lake would have to send their escrow instructions from Salt Lake to the Title Company."

Did you so testify?             A. Yes, sir.

Q. And is your testimony there correct?

A. Yes, sir.

Q. Then you did understand that the details of the escrow instructions would come from Salt Lake, didn't you?             A. Yes, sir.

Q. After the inventory went in?             A. Yes, sir.

Q. I call your attention to page 16, Mr. Estes, and line 23:

"Q. When you signed the inventory were there any conversations about the sale that are different from those you have just related?

"A. The only thing that was said at that time that I remember was that we wanted to rush it through as fast as possible.

"Q. What did he say to that?

"A. He said it had to take so long and certain things had to be done and when those things were done the papers would be back." [164]

Did you so testify?             A. Yes, sir.

Q. And was your testimony correct?

A. Yes, sir.

(Testimony of H. B. Estes)

Q. Didn't you understand that these papers that were to come back were to come back from Salt Lake?

A. No, sir. I didn't know whether they had to come from Salt Lake or the Los Angeles office.

Q. Well, they wouldn't have to come back to Carron if they were in the Los Angeles office, would they?

A. Carron would always bring those papers up there with him.

Mr. Mulliner: I think that is all, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Wilson: Mr. Arthur.

#### ALBERT C. ARTHUR,

called as a witness in behalf of the plaintiffs in rebuttal, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

Q. By Mr. Wilson: Mr. Arthur, on April 1, 1944, at the California Hotel in San Bernardino, at the time and place when this offer, Exhibit 1, was signed by you and Mr. Estes, [165] was there any discussion relative to the taking of an inventory? You can answer that yes or no.      A. Yes.

Q. And who were present on that occasion?

A. Mr. Carron and Mr. Sullivan.

Q. Anybody else?      A. Mr. Estes.

Q. Anybody else?

A. No. There were a lot of people in the lobby.

(Testimony of Albert C. Arthur)

Q. No, I mean who were members of the group involved in this transaction, do you understand?

A. That is right.

Q. What was said at that time and by whom upon this subject, speaking of the taking of an inventory?

A. Well, preceding the signing of this offer to purchase, that was the first time I had seen them and I asked Mr. Carron the exact meaning of this offer and the part that it was in the whole deal. He said that they had no power to sell us any property and that a customer or client, whatever they call them, could only fill out one of these offers to purchase and that then had to go to Salt Lake, and Salt Lake would have to get an appraisal on the property and an inventory of the furnishings and then decide whether our offer would be accepted or rejected. If our offer was accepted it then was ready for escrow for a deal. If it was rejected we then had permission to change our price and make a new offer [166] to purchase and start over again.

Q. Is that the substance of the conversation at that time and place upon this subject?

A. We talked for about a half hour on generalities.

Q. No, I am talking about this subject, that is, the subject of inventory.

A. The inventory and the appraisal of the property would have to be taken care of before we could even get an answer on this offer to purchase.

Q. Have you detailed all the conversation on that subject that you recall? A. That about answers it.

Q. Very well. Was the same subject later discussed by you or in your presence?

A. You mean at a later date?

Q. Yes.

(Testimony of Albert C. Arthur)

The Court: Well, fix the dates.

Q. By Mr. Wilson: Was it discussed on April 25, 1944?

The Court: On the occasion of the inventory, do you mean?

Q. By Mr. Wilson: At the time you assembled and took the inventory?

A. The conversation took—

Q. Just answer yes or no. A. No.

Q. Did you discuss this matter of the taking of the [167] inventory and its purpose at that time on April 25, 1944? A. No.

Q. Was anything said on that day or any day before or after April 25th relative to the taking of an inventory?

A. Yes, on the next day when they came down with the inventory figures and asked me to sign them, I asked them what happened from here on and when we would know when the deal would be completed. He said all we could do would be to send the inventory to Salt Lake and we would have to wait for information from them. I asked him how soon would he be able to let me know. He said I probably would not hear from him at all, that he was leaving the company, and that I would receive the information whether Salt Lake approved the inventory and the appraisal from Mr. Sullivan.

Q. Who is "he"? A. He is Mr. Carron.

Q. Very well. Anything further said on this occasion that you have just referred to?

A. That is all.

Mr. Wilson: Cross examine—pardon me just a minute—yes, you may cross examine.



(Testimony of Albert C. Arthur)

Cross-Examination

Q. By Mr. Mulliner: When Carron told you on the 26th that he was leaving and you would not hear from him but you would hear from Mr. Sullivan, what did Sullivan say?

A. On that day? Sullivan was not there. [168]

Q. Sullivan was not there?                    A. No.

Q. That is the day the inventory was—

A. That is the day the inventory was completed.

Q. You are sure now that Sullivan was not there at that time?                    A. That is right.

Q. And on April 1st, what you are saying is that Mr. Sullivan or Mr. Carron said to you that the inventory would have to be taken and sent to Salt Lake before there would be any acceptance or approval received from Salt Lake? Is that what you say?

A. The inventory and the appraisal of the property would have to be sent to Salt Lake before this offer to purchase—

Q. Let us just talk about the inventory. Do you say now that they told you that this inventory would have to go to Salt Lake, be taken to Salt Lake, before there would be any approval or acceptance of this deal by the Salt Lake office?                    A. Yes, sir.

Q. That is what they told you?                    A. Yes, sir.

The Court: How many rooms in the apartment house? How many apartments?

The Witness: I don't know.

The Court: Does anybody know? [169]

Mr. Sullivan: 42 apartments.

The Court: It was furnished?

The Witness: Yes.

(Testimony of Albert C. Arthur)

Mr. Sullivan: Yes.

Q. By Mr. Mulliner: So you did not expect that there would be any approval or acceptance from Salt Lake until this inventory had been taken and sent in, did you?

A. That is right.

Q. What was your answer?

A. That is right. Yes, sir.

Q. But you did call up the office of the Western Loan here and ask them if the deal had been accepted in Salt Lake, didn't you?

A. I did not.

Q. Did you ever ask either Mr. Carron or Mr. Sullivan between April 1st and April 25th whether or not the deal had been accepted or approved?

A. We had conversations of another deal at which conversations it would come up as to whether anything had been heard from Salt Lake.

Q. By the other deal do you mean the De Anza deal?

A. Yes.

Q. Wasn't that before this?

A. It was all during the same time.

Q. You went down to the De Anza some time before this deal and looked at the property down there? [170]

A. I don't recall the dates.

Q. You gave your deposition previously and it was taken down by Mr. Lynde, court reporter at San Bernardino, did you not?

A. Yes, sir.

Q. (Handing) I call your attention to page 11, line 25—perhaps I better go up a little—to line 21:

“Q. Would you see both of them or just one of them?

“A. Generally one at a time. Generally Carron.

“Q. You generally saw Mr. Carron about once a week following April 1st?

“A. That is right.”

(Testimony of Albert C. Arthur)

Is that your testimony?

A. Pardon me. You are reading where, please?  
You are on page 11?

The Court: What line?

Mr. Mulliner: I started at 21.

Q. By Mr. Mulliner: You are talking there about two of them, do you get that place? You have the place there? When you say both of them there, who are you referring to?

A. Mr. Carron and Mr. Sullivan.

Q. Did you testify as I just read from your deposition there?     A. Yes, sir.

Q. Going on:

"Q. And these meetings took place in your store?  
[171]

"A. That is right.

"Q. That is in San Bernardino?

"A. That is right.

"Q. And taking the first of these meetings, what conversation did you have with Mr. Carron about the property?

"A. I would ask him when we would know about the deal and he would just keep on 'stalling' me and telling me we had to wait for Salt Lake.

"Q. What do you mean by 'stalling'?

"A. As far as the answer to—in other words, an approval from Salt Lake.

"Q. He simply stated to you you had to wait for Salt Lake's answer?

"A. Yes, sir; there was nothing he could do. In other words, our deposit was made subject to Salt Lake."

Did you so testify?     A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. And was that testimony true?

A. Yes, sir.

Q. Going on:

"Q. And that was substantially the whole conversation?

"A. That is right.

"Q. And then the next time you met Mr. Carron the same thing happened?

"A. The same thing over again.

"Q. And the next time and the next time? [172]

"A. There has been no change."

Did you so testify? A. Yes, sir.

Q. Then you go from there, you will notice on 13, and testify about the call in April with relation to taking the inventory, down near the bottom on page 13. Do you notice that? A. Yes.

Q. Did you answer it? A. Yes, sir.

Q. From the examination that you have just made, without reading it all, you went into the question of the call in April about taking the inventory?

A. Yes, sir.

Q. You did receive a call from Mr. Carron with relation to that, did you not? A. Yes, sir.

Q. And you met Mr. Carron when he went out to take the inventory, did you not? A. Yes, sir.

Q. And at that time you thought the deal had perhaps been accepted, I mean before you took the inventory?

A. No, sir.

Q. You did not think so?

A. I asked Mr. Carron if it had been accepted and he told me it was not accepted. [173]

(Testimony of Albert C. Arthur)

Q. You thought it might have been, didn't you?

A. No, sir.

Q. Didn't you? Why did you ask him if it had been if you thought it could not be?

The Court: That is argumentative, counsel.

Mr. Mulliner: That is true, your Honor, but it is cross examination.

The Court: I know, but on my own motion I will sustain the objection to that question.

Q. By Mr. Mulliner: I call your attention to page 5 of your deposition—I will withdraw that question.

Starting on line 21 on page 14:

“Q. Did you have any conversation at that time with Mr. Carron concerning an acceptance by Salt Lake of your offer to purchase?

“A. Yes, we asked him.”

Are you following me there?

A. No. What line?

Q. I started on line—I passed over the objection of counsel there, but I started at line 21 on page 14.

A. You said page 15, I understood. Yes, sir.

Q. I will read it again and you follow it:

“Q. Did you have any conversation at that time with Mr. Carron concerning an acceptance by Salt Lake of your offer to purchase?

“A. Yes, we asked him. [174]

“Q. We—you were the only one on the telephone, weren't you?

“A. You are talking about the day we took the inventory?



(Testimony of Albert C. Arthur)

“Q. No, the telephone conversation.

“A. Oh, the day of the telephone conversation we just talked about the preparation for the inventory.”

You so testified, did you not?      A. Yes, sir.

Q. (Reading):

“Q. And on that occasion Mr. Carron did not state to you that Salt Lake had accepted the offer?

“A. I asked him if Salt Lake had accepted the offer and he said we would have to take an inventory first and send it to Salt Lake.”

You so testified?      A. Yes, sir.

Q. All right. Now, let us go over to page 17 and I will start on page 4—

The Court: Page 4?

Mr. Mullinger: Page 17, line 4.

Q. By Mr. Mulliner: (Reading)

“Q. Was there any conversation after the three of you had met at the Carnation place concerning the sale of the property?

“A. I asked him if this deal had gone through.”

Did you so testify? [175]      A. Yes, sir.

Q. At that time did you think it might have gone through?

A. I would keep on asking every time I saw him.

Q. What is it?

A. I kept on asking him every time I saw him.

Q. Why did you ask him?

Mr. Wilson: I object to it as immaterial and argumentative.

The Court: Overruled. Why did you ask him?

(Testimony of Albert C. Arthur)

The Witness: Well, I had \$4,300 invested and I would kind of like to know—

Q. By Mr. Mulliner: Well, you asked him because you kind of thought it might have gone through and you wanted to find out?     A. Exactly.

Q. Isn't that true?

The Witness: Yes, sir.

The Court: Let us read the rest of this on that same page 17:

"A. I asked him if this deal had gone through.

"Q. You asked Mr. Carron?"

Read on down through to line 17.

Mr. Mulliner: (Reading)

"Q. You asked Mr. Carron?"

"A. Yes." [176]

You mean on from where I left off there, your Honor?

The Court: All right.

Mr. Mulliner: (Reading)

"Q. What did he say?"

"A. I gave him a reason that I wanted to know one way or the other because if the deal has gone through I wanted to hire the manager of that apartment, and he says 'No, the deal has not gone through and I don't want you to make any remark to the manager of the apartment that she is to make any kind of a change.'

"Q. Was there anyone present at this conversation other than Mr. Estes?"

"A. That is all.

"Q. Just the three of you?"

"A. That is right.

(Testimony of Albert C. Arthur)

"Q. Was there any other conversation at that time—this is before you went to take the inventory?

"A. We ate and talked there for an hour.

"Q. But so far as you can remember nothing else was discussed about the sale or about Salt Lake's acceptance or about an escrow or anything except the actual taking of the inventory?

"A. Yes, I asked him if the deal was through and he said 'No, the inventory has to go to Salt Lake to be approved before Salt Lake can give their answer' and then is when—"

Well— [177]

The Court: Finish the sentence while you are at it.

Mr. Mulliner: I will do it but I don't want to introduce something in the cross examination on another subject.

The Court: All right.

Mr. Mulliner: (Reading)

"—then is when he brought up the case of the other apartment where they had a larger inventory than their records showed."

Q. By Mr. Mulliner: Did you so testify?

A. Yes, sir.

The Court: How much longer will you be with this witness?

Mr. Mulliner: Just about three minutes, I think. Since I have looked at the clock, I will say five minutes if that is all right.

Q. By Mr. Mulliner: At that time Mr. Carron told you, did he not, that these papers to close this escrow had to come from Salt Lake, the inventory as well as the other papers?

(Testimony of Albert C. Arthur)

Mr. Wilson: Where do you read that?

Mr. Mulliner: I am not reading it. I am just asking it.

A. May I have the question again?

Q. By Mr. Mulliner: If at the time the inventory was completed Mr. Carron did not tell you that?

(The previous question was read.)

A. Yes, sir.

Mr. Mulliner: I think that is all. [178]

Mr. Wilson: Your Honor, I would like to ask a few questions but it would probably take longer than we have available now.

The Court: Go ahead. Have you any more rebuttal?

Mr. Wilson: No other.

The Court: Have you any sur-rebuttal?

Mr. Mulliner: We will have one or two questions directly on these matters that they have testified to.

The Court: Well, what I am trying to get at is this, I would like to know what time we can finish. My wife is ill in bed and alone so I would like to finish as early as I can this afternoon and get home to take care of her.

Mr. Mulliner: We would have no objection to coming back earlier than 2 o'clock if Court and counsel have none.

The Court: 1:30?

Mr. Mulliner: That would be entirely satisfactory to us.

The Court: We will recess until 1:30.

(Whereupon a recess was taken until 1:30 p. m. of the same day, Thursday, January 11, 1945.) [179]

Afternoon session, 1:30 o'clock.

ALBERT C. ARTHUR,

called as a witness in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

Redirect Examination

Q. By Mr. Wilson: Mr. Arthur, will you examine your deposition beginning on page 6, line 18, and read down to page 8, line 20?

Mr. Mulliner: Just a moment.

Mr. Wilson: Just read it to yourself, of course.

A. (Witness complied.)

Q. Have you done so? A. Yes.

Q. On the occasion stated previously, namely, the taking of your deposition, did you testify as follows:

"Q. Both of them stated that to you?

"A. That is right. Neither one of them had the power to make any kind of a deal with me or Mr. Estes and that all we could do, as they said, to start the deal rolling was for us to sign a blank which was an option to buy and only subject to Salt Lake's approval. They themselves could not give us any kind of an answer.

"Q. Was there any discussion at that time concerning an inventory of the property? [180]

"A. They mentioned that an inventory would have to be taken.

"Q. And was there any discussion as to when the inventory would be taken?

"A. They were to let us know at some future date.



(Testimony of Albert C. Arthur)

"Q. Was that date to be fixed upon the happening of any other events?

"A. Not that I recall.

"Q. They did not state—neither Mr. Carron nor Mr. Sullivan stated to you that after Salt Lake had approved the transaction that then the inventory would be taken?

"A. No, they told me the other way around. Salt Lake could not give their answer until after the inventory was taken.

"Q. You say 'they'—

"A. Speaking of Carron and Sullivan.

"Q. Do you know which it was, Mr. Carron or Mr. Sullivan?

"A. They were together. I would have no way of knowing which one.

"Q. All right—proceed.

"A. They referred to some other apartment house deal whereby the inventory was the element that kept the deal from going through because they found more blankets and bedding in the inventory than what Salt Lake showed and Salt Lake turned the deal down, and that was the reason that no deal could be made with us until after the inventory was sent to Salt Lake [181] and approved by them.

"Q. They did not advise you that the inventory was to be taken after Salt Lake's approval?

"A. It was the other way around.

"Q. And was there any discussion at that time about an escrow?

"A. There was to be an escrow after Salt Lake approved the deal."

Did you so testify?

A. Yes, sir.

(Testimony of Albert C. Arthur)

Q. Will you also, in like manner, refer to page 18, line 5 to line 14?

A. (Witness complied.) Yes, sir.

Q. Have you read it? A. Yes, sir.

Q. Will you also read the preceding question and answer, Mr. Arthur, beginning on page 17, line 22?

A. (Witness complied.)

Q. You will observe in the preceding question and answer which was read to you this morning, beginning on line 2 of page 18:

“\* \* \* then is when he brought up the case of the other apartment where they had a larger inventory than their records showed.”

Q. Do you observe that? A. Yes, sir. [182]

Q. Now, is the other apartment referred to in that portion of your answer the apartment of which you had previously spoken in the preceding question and answer?

A. State that question again, please.

(Question read.)

A. Yes, sir.

Q. By Mr. Wilson: Now, then, continuing on page 18, line 5, did you testify as follows in response to the following inquiries:

“Q. Do you recall him mentioning the name of that apartment or where it was located?

“A. I did not ask him the name of the apartment.

“Q. You don’t know whether it was Los Angeles or San Francisco or where?

“A. No. He used that as an example to prove to me that it would be impossible to give a definite answer on this apartment until Salt Lake had the papers approved

(Testimony of Albert C. Arthur)

from down here which took in the inventory as well as whatever legal papers they had to have."

You so testified, did you?      A. Yes, sir.

Mr. Wilson: No other questions, your Honor.

Mr. Mulliner: No questions.

The Court: Step down.

(Witness excused.)

The Court: By the way, in the pre-trial memorandum [183] submitted by the defendant as a proposed exhibit was an escrow instruction. I don't find that in the exhibit which was offered here as Defendant's Exhibit E, which I understood to be all of the papers that were deposited in escrow. It is attached to the pre-trial memorandum and designated there as Defendant's C. It is on a printed form addressed to the Security Title & Insurance.

Mr. Mulliner: I will have Mr. Sullivan explain that to your Honor.

The Court: I think counsel could make a statement.

Mr. Mulliner: Well, it is a paper that was drawn up over at the bank on one of their forms and I don't know whether it was used or not. It is supposed to carry the same instructions that are in our letter, and we do it by letter.

The Court: I understand, but it was offered here as a proposed exhibit. If you don't want to offer it—

Mr. Mulliner: I don't know whether it was used or not in this case.

Mr. Perelli-Minetti: I think that was my error. I picked up the file and there was the form and I automatically submitted it rather than the letter.

The Court: Very well. Is that all? Do you rest?

Mr. Wilson: Yes, your Honor.

The Court: Sur-rebuttal?

Mr. Mulliner: Yes, your Honor. Mr. Carron, will you take the stand? [184]

### JAMES CARRON,

called as a witness in behalf of the defendant in sur-rebuttal, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

Q. By Mr. Mulliner: Mr. Carron, I will ask you if on April 1, 1944, at the place this offer to purchase was signed and either before or after the signing of it, you stated in substance or effect that the inventory would have to be taken or sent to Salt Lake before any acceptance or approval of the deal could be received.

A. Do I understand the question correctly that the inventory would have to go in prior to acceptance or rejection?

Q. Yes. A. No, we never did that.

The Court: What? You never said anything like that?

The Witness: No, I never said anything like that.

Q. By Mr. Mulliner: I will ask this: Did you on May 8th make any such statement in substance or effect that the inventory had to be taken and sent in before there would be any acceptance or approval from Salt Lake to either of these plaintiffs?

The Court: May 8th?

Mr. Mulliner: Yes.

(Testimony of James Carron)

The Court: You mean April 25th?

Mr. Mulliner: I am asking it on May 8th because they [185] indicate that he was there on May 8th. I don't mean May 8th. I mean April—let me correct that. I mean April 26th, that is right. I will withdraw that date of May 8th.

Q. By Mr. Mulliner: On April 26th at the time that the inventory was signed did you make any such statement in substance or effect?

The Witness: Will you repeat that?

(Question read.)

The Court: You better reframe your question, Mr. Mulliner.

Mr. Mulliner: Yes. Let me withdraw that.

Q. By Mr. Mulliner: I will ask you if on or about April 26th, at the time this inventory was taken or signed, you stated to either of these plaintiffs in substance or effect that the inventory would have to go in to Salt Lake before there would be any acceptance or approval of this deal?

A. No, nothing was ever said along that line.

Q. You say you never said anything like that to these parties at any time or place?

A. Not to the effect that the inventory had to go in to Salt Lake before it was accepted, no.

Q. I will ask you now if on or about April 1, 1944, and at or about the time that this offer to purchase was signed, you referred to some other apartment house deal where the inventory was involved and stated in substance or effect that the deal did not go through because when the inventory was [186] taken there were more blankets and bedding in the inventory than what Salt Lake had showed and that Salt Lake turned the deal down and that



(Testimony of James Carron)

no deal could be made with them until after the inventory was sent to Salt Lake and approved by them? Did you make that statement in substance?

A. I never made any such statement of that kind. Nothing like that was ever discussed.

Q. Did anything like that ever happen in your experience with the Western?

A. Not to my knowledge, no, sir.

Q. That there was any turn-down over any inventory being taken or any question of any blankets or bedding being there?

A. Nothing. Nothing like that ever happened.

Q. You did not make any such statement at that time or any other time or place?

A. No, sir.

Q. When you did take the inventory, state whether or not the apartments in this apartment house were occupied.

A. They were all occupied. At least, there was a tenant assigned to each apartment. The tenant may not have been in at that particular time but the apartments were all sold.

Q. Did you ever take an inventory on any sale for this company where the inventory was taken before the acceptance?

A. No, we never did that.

Mr. Wilson: I object to it as immaterial. [187]

The Court: The answer may be stricken. The objection is sustained.

Mr. Mulliner: You may cross examine.

Mr. Wilson: No questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: Mr. Sullivan, will you take the stand?

F. E. SULLIVAN,

called as a witness in behalf of the defendant in sur-rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Mulliner: Mr. Sullivan, I will ask you if on or about April 1, 1944, at San Bernardino, or at any other time or place, you ever stated to these plaintiffs, or either one of them, in substance or effect that there had to be an inventory taken and sent in before you could get approval or acceptance of this deal from the Salt Lake office?     A. No.

Q. I will ask you if anything was ever said by you or in your presence relating to some other apartment house deal whereby the inventory was involved, that is, any statement with reference to this matter in connection with this transaction and that more blankets and bedding were found in the inventory than what Salt Lake showed and that Salt Lake turned down the deal for that reason? [188]

A. That never happened.

Q. Did you ever hear of any statement of that kind?

A. No, sir.

Q. Or ever hear any statement of that kind?

A. No, sir.

Q. Was there ever any such thing as that that happened?     A. Not to my knowledge. I never heard of anything like that ever happening.

Q. I will ask you now, Mr. Sullivan, to state if you can of your own knowledge whether or not the Salt Lake office prior to April 22, 1944, had an appraisal on this property, including a separate appraisal on the furniture?

A. Yes, they did.

(Testimony of F. E. Sullivan)

Mr. Wilson: Wait just a minute, please. Have you finished the question?

Mr. Mulliner: I was going to ask another part of it but I will stop there and accept the answer.

Mr. Wilson: I don't want the answer. I want to have a chance to object.

The Court: The answer may be stricken for the purpose of objection.

Mr. Wilson: Objection on the ground it is incompetent, irrelevant, and immaterial, not the best evidence, and no foundation has been laid for it.

Mr. Mulliner: I was continuing to lay the foundation.

The Court: Objection overruled. [189]

Q. By Mr. Mulliner: Your answer is what to that part of the question?

A. Yes, they did have.

Q. I will ask you if that was by one of the appraisers approved by the Building and Loan Commissioner of the State of California to appraise properties for sales by Building and Loan Associations?

Mr. Wilson: The same objection, if your Honor please.

The Court: Overruled. Let me see. Your answer to the previous question was that the separate appraisal of the furniture and the house was made before April 21st?

The Witness: Yes.

The Court: After April 1st?

The Witness: After April 1st, that is correct.

The Court: Did they have an inventory when they made the appraisal?

The Witness: Of course, the appraiser goes in and makes his own inventory. The home office would have the inventory and they would know the furniture that is in that building.

(Testimony of F. E. Sullivan)

Q. By Mr. Mulliner: Do you know whether the appraiser actually makes an inventory? A. No.

Mr. Wilson: The same objection, if your Honor please, not the best evidence.

The Court: Overruled. The witness says he does not know. [190]

Q. By Mr. Mulliner: Who was that appraiser?

A. George L. Schmutz.

The Clerk: K for identification.

The Court: Do you want to show it to counsel?

(The document was handed to Mr. Wilson.)

Q. By Mr. Mulliner: I show you what has been marked for identification as Exhibit K and ask you if that is the appraisal report that you just referred to?

A. (After examining) Yes, it is.

Q. Can you indicate the page on which the furniture or furnishings is set up separately?

A. It is on this page here, "Replacement Cost."

Q. And what is the item there?

Mr. Wilson: I can't hear you gentlemen very well over here.

A. It is on a page that has a heading "Replacement Cost." The page is No. 4, and the furnishings as is—

Mr. Wilson: Just a minute. You have answered the question.

Mr. Mulliner: What was your suggestion, Mr. Wilson?

Mr. Wilson: He has answered the question. I didn't want him to read the document.

Mr. Mulliner: I was locating the item.

Q. By Mr. Mulliner: It is listed there as what?

A. "Furnishings 'as is' \$6,000."

Mr. Mulliner: We offer this. [191]

(Testimony of F. E. Sullivan)

Mr. Wilson: We object to it on the ground it is incompetent, irrelevant, immaterial, hearsay, and no foundation laid for it.

The Court: It is admitted, but not on the issue of liquidated damages.

[DEFENDANT'S EXHIBIT K]

Appraisal Report

NORMAN MANOR

and

NORMAN MANOR ANNEX

N. E. Cor. "E" & 17th Streets

San Bernardino, California

Real Estate 4427 & 4430

\* \* \*

GEORGE L. SCHMUTZ

Realtor Appraiser

4725 Ledge Avenue

North Hollywood, California

April 18, 1944.

Western Loan and Building Company.

308 West Olympic Boulevard,

Los Angeles, 15, California.

Re: Norman Manor Apartments

and

Norman Manor Annex

N. E. Cor. of "E" and 17th Sts.

San Bernardino, California

Real Estate 4427 & 4430

Gentlemen:

Pursuant to your request, I have personally inspected the above mentioned property which is more particularly described elsewhere herein.



(Defendant's Exhibit K)

By reason of my investigation and by virtue of my experience I have been able to form and have formed the opinion that the fair market value of the said property, as of this date is—

—Eighty Thousand Dollars (\$80,000)—

Your attention is invited to the data and discussion here following.

Respectfully submitted,

George L. Schmutz

GLS:ef

## DISCUSSION

### The District

The Norman Manor Apartment is located in the better residential district of a decade or two ago. The property is situated on the principal north and south commercial street although about a dozen city blocks to the north of the downtown shopping area, and only a few blocks from the Base Line Shopping District. In the intervening areas are scattered infiltrations of commercial enterprises replacing old residences. However, the old residences form the major part of the land usage.

### The Land

The subject land is legally described as Lots 13, 14, and 15 in Block "E", The Palms, City of San Bernardino, County of San Bernardino, State of California.

The land comprises the northeast corner of "E" and 17th Streets. It has a frontage of 200-feet along the east side of "E" Street and a frontage of 150 feet along

(Defendant's Exhibit K)

the north side of 17th Street. It is bounded on the north by a 20-foot alley.

The land is level with the sidewalk. All public utilities are installed. Both streets are paved and have concrete sidewalks and curbs.

### The Land (Cont)

The side is attractively landscaped with a spacious lawn and Lombardy Poplar trees.

If vacant, the land would have a probable value of \$12,000 if building materials were available.

\* \* \*

### The Structures

There are 2-separate buildings on the land. The Norman Manor Apartment, the building on the corner, is 132 feet wide, along 17th Street, and 89-feet deep, along "E" Street. It is "U" shaped with the hollow part, 44' x 49', which is the entrance court that faces 17th Street. The gross area of the 2-floors is 19,236 square feet.

This building is a 2-story Norman style structure of frame and stucco construction. The roof is flat and covered with roll composition roofing except for the Mansard type edging which is covered with wood shingles.

Excepting the entrance lobby, which has a marble floor, all floors are pine covered with carpet. The walls and ceilings are plastered. The baths have tile floors and 3-plumbing fixtures with showers over the tubs. There is a built-in electric refrigerator in each kitchen which is

## (Defendant's Exhibit K)

cooled by a central unit in the basement. There are gas-steam radiators in each living room. There is a central

The Structures (Cont)

hot water plant and 2-laundry trays in the basement.

The structure was completed in 1928. The outside walls and trim are in need of paint. There are flashing leaks and this has damaged several of the apartments. At least 6 of the apartments are in considerable need of re-decoration.

The carpets in the halls are bad. In 9 of the units the carpeting is good, in 5 it is bad and, in the other 16 it is only fair. The gas ranges and built-in refrigerators appear to be the original installations—16 years old. While still serviceable yet they are tolerable today only because of the acute housing shortage.

The Annex is of the same age, type of construction, and condition. It is a 2-story building with a frontage of 44 feet along "E" Street and 94 feet deep. The rear width is 38 feet. The gross area of the two floors is 7,312 square feet.

The roof of this structure is bad and has adversely affected 4 of the rental units. At least 4 of the apartments are in need of redecoration. The carpets in 2 are good, in 2 they are bad, and in the other 8 they are only fair.

In general, what has been said about the Norman Manor applies also to the Annex.

There are no garages for either of the buildings.

Replacement Cost

The probable cost less depreciation of the said property is as follows:

(Defendant's Exhibit K)

<u>Land</u>	—	\$12,000
<u>The Structures</u>		
26,548 sq. ft. @ \$4.50	\$119,466	
less depreciation		
16 years—48%	57,344	
Depreciated Cost	\$ 62,122	
Furnishings "as is"	6,000	
Sub-total	\$ 68,122	68,122
Total	—	\$80,122

\* \* \*

### The Income and Expenses

The current rental schedule of this property, both structures, is as follows:

#### Norman Manor

<u>Units</u>	<u>Rent</u>	<u>Per Month</u>	
9-dbl.	\$45.00	\$ 405.00	
1-dbl.	42.50	42.50	
1-dbl.	40.00	40.00	
1-dbl.	45.00	45.00*	
1-sgl.	27.50	27.50	
2-sgl.	30.00	60.00	
10-sgl.	32.50	325.00	
5-sgl.	35.00	175.00	
30-units		\$1,120.00	\$1,120.00

(Defendant's Exhibit K)

Annex

1-sgl.	27.50	27.50
6-sgl.	30.00	180.00
3-sgl.	32.50	97.50
2-sgl.	35.00	70.00
<hr/>		
12-units	\$ 375.00	375.00
<hr/>		
Total per month		1,495.00
Total per year		\$17,940.00

Note. The reported collections for the year 1943 were \$18,139.94. This included the manager's apartment shown thus—\*.

\*   \*   \*

Income and Expense (Cont)

The house furnishes, as a part of the rent, the cost of all public utilities and maid service twice a month. The reported expenses for 1943 were as follows:

Salaries	—	\$3,412.56
Fuel	—	806.80
Electricity	—	939.44
Water	—	332.45
Power	—	214.58
Laundry	—	102.35
Telephone	—	70.79
Supplies	—	49.79
Replacements & Maint. Bldg.	—	253.99
Taxes	—	2,444.80
Insurance	—	272.19
Repl. & Maint.—Furn.	—	231.77
Misc.	—	158.00



(Defendant's Exhibit K)

Painting	—	36.42
Garage rent	—	32.50
Commission	—	1.68
<hr/>		
Total	—	\$9,360.11
<hr/>		

\* \* \*

The Value Conclusion

Transactions in the market indicate a probable sale price of—

- a) 4.7 times the rental schedule, and
- b) 9.0 times the net income.

On these bases the indicated probable sale price is,—

- a) 4.7 times \$18,000 being \$84,600.00
- b) 9.0 times 8,600 being 77,400.00

\* \* \*

The Value Conclusion (Cont)

Thus, on the basis of income the value appears to be about \$80,000. The cost estimate as hereinbefore shown, indicates a figure of \$80,122. From these data it is concluded that \$80,000 is representative of the fair market value.

\* \* \*

Case No. 3815-PH. Arthur, et al. vs. West. Loan. Defts. Exhibit K. Date Jan. 11, 1945. No. K in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

[Endorsed]: Filed Jun. 15, 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: No questions.

The Court: Step down.

(Witness excused.)

Mr. Mulliner: We rest, your Honor.

The Court: Do you rest again? Everybody rests?

Mr. Wilson: Yes.

The Court: All right. I think, Mr. Wilson, that I would like to hear from the defendants in connection with the matter. I have read your briefs and memorandums submitted in connection with this. Will you touch in your argument on the proposition as to how under the law, assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was—how that constitutes an acceptance when there was then no inventory, nothing upon which a bill of sale could be drawn, when there was never anything which was given to the plaintiffs in writing signed by any official or any person representing or purporting to represent the Western Loan & Building Company, whatever its name is?

Mr. Mulliner: Your Honor, I was wondering, in view of your Honor's situation as stated this morning, whether it would [192] be preferable to file briefs.

The Court: I don't think so. The pre-trial memorandums were filed and I would rather dispose of the matter today while the testimony is fresh in my mind.

Mr. Mulliner: Mr. Perelli-Minetti will argue that point of law to your Honor. Perhaps it is not necessary, but I was going to comment a little upon the question of fact as to whether or not there really was such an oral acceptance and notification.

The Court: Let us assume that there was such an oral statement.

Mr. Mulliner: Well, then, perhaps I better not burden your Honor with that and just let counsel argue the law question.

Mr. Perelli-Minetti: I think your Honor's question relates perhaps to the statute of frauds, and I think that most of us—I know I was before I got into this case—are of the opinion that there must be a writing, a written agreement, before the defendant can be successful in an action of this type, and I think it stems from the statute of frauds and from the fact that we know in the preparation of deeds, mortgages, and things of that nature, that there must be an exact certainty of description. Otherwise the deed or the conveyance will fail.

Here we have not a conveyance nor an attempted conveyance but we have what for all practical purposes is nothing [193] but an oral agreement. In other words, Mr. Estes and Mr. Arthur come and say to us in effect, "We will buy the *Noraman* Manor Apartments. We will give you \$86,750, so much down and so much payable over a period of time. That if accepted at that time is sufficient.

The case of *Harper v. Goldschmidt*, 156 Cal. 245, involved the basis of the question, or at least one basis of what I deem to be the Court's query, and in that case the vendor of real property attempted to specifically enforce a sale of land. The only instrument in writing was a receipt and a contract, a receipt of the down payment which had been made by vendee or the purchaser, and the contract of sale which he had signed and presented to the vendee. The court held, and it is an exhaustive opinion—I think that the Supreme Court's words at the

beginning of the case were something along these lines, that such a contrariety of opinion on this subject, the Statute of Frauds, should exist, excites comment, and we shall resolve forever these doubts, or we shall attempt to resolve the doubts, and then they go on with the case and the court holds in that case that the vendor could not specifically enforce that agreement.

That is not our case, but with reference to the Statute of Frauds the court states:

“Before the Statute of Frauds, an oral agreement could be proved against either party. The Statute of Frauds in no way interfered or attempted to interfere with the antecedent [194] oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged.”

Then we come to the case—

The Court: Do you think the Western Building & Loan were to be charged here?

Mr. Mulliner: Not in this State.

Mr. Perelli-Minetti: Not in this State, your Honor.

The Court: Under that agreement weren't they one of the parties to be charged?

Mr. Perelli-Minetti: No. In that connection may I call your attention to another passage from the *Harper v. Goldschmidt* case, and I quote:

“The English Statute of Frauds and Perjuries of Charles II, to which the similar statutes of all our States owe their origin, used the phrase ‘party to be charged’ in precisely the same manner and to the same effect as it is now used in our sections of the Code. A glance at the English cases will establish that the ‘party to be



charged' did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant.”

If we had here a suit for specific performance we might have another question, but here we have a written offer which contains the terms, which contains the description of the [195] property, and, although that is not in issue in this case, any defense which might have been based upon lack of mutuality in a specific performance suit would have been eliminated by the mere fact that we came into court and attempted to compel specific performance.

Now, getting to an exact case, a case on all fours, and that is what we lawyers search for, I call to the Court's attention the case of *Laffey v. Kaufman*.

The Court: That is cited in your memorandum?

Mr. Perelli-Minetti: That is correct, your Honor. In that case there was not one single piece of writing, there was a pure oral agreement. The vendor said, “I will sell for so much”, and the vendee said, “I will accept”, and the vendee paid under that oral arrangement \$500 down on a \$1,500 purchase price, the balance to be paid by notes secured by mortgage. The vendee, or the plaintiff, just like Mr. Arthur and Mr. Estes in this case, refused to complete the contract, they refused to pay the balance, and sued for the return of the \$500 down payment, which corresponds to our \$4,337.50. The trial court gave judgment for the plaintiff and it was reversed in the Supreme Court and it is still the law of this State, it has never been set aside nor modified that I know of, and from this I quote:

“We think the court—” the trial court—“was in error in overruling the demurrer and in refusing to hear de-



endants' evidence. The action is not one to enforce the [196] specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the Statute of Frauds.

"The plaintiff, having made the contract, which is not unlawful—" this is not an OPA contract—"nor against public policy, and having paid the money thereunder,—" just as Estes did here and Arthur—"cannot, of his own volition, and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration,—to-wit, the agreement to convey the land."

Further on:

"The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part." Citing a number of cases.

That is our situation. We have an action here which is based in a large degree, in reading the pre-trial brief of the plaintiffs, upon equity and good conscience, and in that connection I call to the Court's attention the bottom of page 3 of the plaintiffs' pre-trial brief under Point II:

"The common count of money had and received—" and I read from the brief—"is the appropriate remedy.

"In 17 Cal. Jur. 602, it is said: [197]

"The basis of the action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff. And, generally speaking, the action lies in all cases where one

person has in his possession money which in equity and good conscience he ought to pay over to another.'"

The brief then goes on to refer to another case where good conscience and equity are mentioned.

Now, we have two people, a company and two purchasers, who, after you boil down the manner in which the acceptance was given and the time which elapsed, which was necessary and which was planned upon by the parties, we have the purchasers saying, "We will buy this from you for so much money." And we have the Western Loan & Building Company saying, "We will accept." That, your Honor, we believe, is sufficient under our California law.

We have under that arrangement a new assumption of facts which we are now discussing, a vendee admitting that position and yet asking this Court—

The Court: Do you think that Mr. Carron's communication to them was a legal acceptance?

Mr. Perelli-Minetti: Yes, your Honor. There is nothing that compels us to write. It might have been better judgment.

The Court: He had previously stated to them that he had no authority to act.

Mr. Perelli-Minetti: That was prior to April 24th, [198] when he telephoned and said, "Salt Lake has accepted." He then communicated the acceptance from the home office.

The Court: That is what he said, but he had previously said that he had no authority to act. He never offered to show them anything. This Exhibit I, which is in evidence, does not indicate that this is an acceptance of that offer:

"Sale of the above properties as outlined in your letter of April 5th is approved."

I don't know what that may mean. It might be a sale to anybody for \$86,000 or any other sum. It says, "Sale of above property."

Mr. Mulliner: May I remind your Honor that Mr. Sullivan testified that it was an authorization to sell this property?

The Court: All right, that is what Mr. Sullivan says, but he says he hasn't any authority either. This is the only thing that has been produced from the Western Building & Loan by any person who has any authority to accept the sale.

Mr. Mulliner: On the 8th and before this was withdrawn and before the closing date we told them again that we were ready to close and the closing papers were there to close.

The Court: But you didn't tell them before the 1st except that if Mr. Carron's communication is an acceptance.

Mr. Mulliner: That would not make any difference if this is what they say it is, an offer. It had never been withdrawn.

The Court: It was limited to May 1st. [199]

Mr. Mulliner: No, I don't think so, your Honor. That is another legal point that we have.

The Court: Tell me about that one then.

Mr. Mulliner: There was nothing, as I interpret it, in that contract which forecloses that offer, if it was an offer, on May 1st. It was irrevocable, it could not have been withdrawn before that date.

The Court: I see your point.

Mr. Mulliner: You see, we went on and took this inventory late in April and told these parties that it had to be assembled and typed up and sent in to Salt Lake to be incorporated into the chattel mortgage and sent back here, so there could have been no thought in anybody's mind that it would be back by May 1st.

Mr. Perelli-Minetti: In that connection, may I call to your Honor's attention at page 4 the same interpretation which was placed upon that phrase by the plaintiffs, at line 23.

The Court: Page 4?

Mr. Perelli-Minetti: Page 4 of the plaintiffs' pre-trial brief:

"If the offer was withdrawn after May 1st and prior to acceptance—"

The Court: I see.

Mr. Perelli-Minetti: (Continuing)

"—the money was to be returned."

Plaintiffs themselves take the position that the offer [200] extended beyond May 1st. The irrevocable part of that offer was simply up to May 1st.

There is also in that offer, if you will notice, a closing date of May 15th, and I think, for the purpose of argument, which we do not concede, but simply for the purposes of argument, that even though a time limit is fixed as of May 1st, yet the parties can by their acts waive the time limit. Now, here the testimony was clear that on the 26th there was knowledge that the papers had to go to Salt Lake, that escrow papers had to come from Salt Lake, that Mr. Carron was leaving—

The Court: I really don't think, counsel, under the evidence, and I have followed it very carefully, that there



was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don't see how you are going to give a bill of sale and give a chattel mortgage until you have an inventory and know what is going to be in the bill of sale.

Mr. Mulliner: That we agree with. The bill of sale and the chattel mortgage required the inventory, and that is why we took it.

The Court: Would they have to have the inventory in order to make the bill of sale?

Mr. Mulliner: That is right.

The Court: If the offer had been accepted before the date of the inventory, it would have been a very easy thing [201] to have communicated the formal acceptance and opened an escrow and demanded the inventory in the escrow if it was not the intention of the parties to say that this inventory was taken to be submitted to Salt Lake City before it was finally accepted.

Mr. Mulliner: If your Honor will pardon me, that is based upon the proposition that your Honor does not believe that Mr. Carron called and gave some acceptance to Mr. Arthur?

The Court: Well, I don't know. I am not sure but what Mr. Carron's memory might not be completely accurate in that respect. It seems to me that if he had done that and then went out to San Bernardino for two days, being there with the parties taking an inventory, he would have said something about it again.

Mr. Mulliner: The very fact that they were known to take the inventory, your Honor, and to go into every one of these individual apartments and disturb those tenants is a circumstance indicating—

The Court: If it had been accepted, Mr. Carron or somebody would also have had authority to sign this



inventory with these parties here, if the deal had been accepted when this inventory was taken, but the fact that nobody signed this for the Western Loan & Building Company right while they were taking it and looking at it is an indication to me that it was not accepted.

Mr. Mulliner: You see, your Honor, we were selling to [202] these people and all we wanted was that they were satisfied with the inventory that they were getting which was to be incorporated in their bill of sale and which they were giving back to us in a chattel mortgage.

Now, you see, we have in addition to that, the fact, as I read from Mr. Estes' previous testimony, that he said that Mr. Carron had said to him that there was a telephone call of acceptance. I am giving the substance of it. Mr. Carron had to make that before May 1st because Mr. Carron was never there after April 29th. I am just discussing now the probability of the statement of Mr. Carron being true. The fact that they did go on and pursue it, the fact that one of the plaintiffs practically admits it, and the fact that the authority to accept came on that day, and the other things, fall in sequence, the fact that the telephone record shows that there was a call to Mr. Arthur.

The Court: There were several calls. The plaintiffs admitted that they had made several calls.

Mr. Mulliner: No; from our office to Arthur on that day. We feel that those circumstances are persuasive as to the facts.

Now, as to whether or not, if that was done in the way that Mr. Carron says, it constituted an acceptance, that is a matter—

The Court: I don't think, counsel, I care to waste any more time on the question of whether or not there was in fact [203] an acceptance before May 1st. I

don't believe under the evidence that I will be justified in holding that there was an acceptance by the defendants here before May 1st or that that acceptance was communicated to the plaintiffs here.

Mr. Perelli-Minetti: If we had, your Honor, if I may interrupt you, a case here where the inventory were a substantial portion of the transaction, then perhaps the inventory would have been indicative of the status of the sale or the acceptance or the non-acceptance, but here we have a transaction, a sale of \$86,750, and we have an inventory of \$6,000. While it is a lot of money, and it is a lot to me, it is a relatively small—

The Court: It is 8 per cent, about, and 8 per cent of anything is a big per cent when you can only get  $\frac{1}{2}$  of 1 per cent on your money when you invest it.

Mr. Perelli-Minetti: That is in banks, your Honor.

Mr. Mulliner: Of course, we had an appraisal on that by an official appraiser in addition to our other information. These people did not need that inventory to make this offer because they made it without it, and we did not need it in order to accept it because we had this appraisal as to value. It did not matter how many teacups or how many sheets there were so long as we had the approximate value of it in accepting the offer.

The Court: All right, let us go to your other point now.

Mr. Perelli-Minetti: Even if, for the purpose of [204] argument, there was not an acceptance prior to May 1st, the offer did remain open, it was not irrevocable but it did remain open, after May 1st. On May 9th Mr. Sullivan deposited the papers in escrow and the company was irrevocably committed. The letters and the telegrams of revocation or repudiation, whatever we may call them, were not received—

The Court: He admitted he had been informed of the fact the previous day.

Mr. Mulliner: Yes, he tendered them on the 8th but he didn't take them over there—

The Court: He called up on the 8th on the 'phone and said Mr. Arthur told him he would not go through with the deal and that a telegram had been sent to him advising him to that effect, and he prepared this on the morning of the 9th, his letter on the morning of the 9th.

Mr. Mulliner: But apparently it is quite obvious that the telegrams were not sent.

The Court: They were received at 9:15 in the morning and read to him over the telephone, but he dictated this letter, and that is his testimony.

Mr. Mulliner: That is true as to the letter, but this telephone conversation was on the 8th. The telegram which came here was not received here until 10:13 in Los Angeles the night of the 8th and not communicated until 9:21 the next morning.

The Court: I understand, but after he received the [205] telegram and after he had been advised of it and that the deal was revoked, he nevertheless then dictated the letter of transmittal and took over the escrow papers to the bank or whatever it is in San Bernardino.

Mr. Mulliner: The only point I am making here, your Honor, is that he tendered that performance and those documents before they had ever told him on the telephone that they were not going through with the deal. That is the only point I make.

Mr. Wilson: That is not correct.

Mr. Mulliner: That is correct, that he called him up and told him that the documents were here and they were prepared to close the deal and that he would be over to close it. Then it was that Mr. Arthur told him that they

had decided not to go through with it or something to that effect and that he should have had a telegram to that effect.

The Court: Go ahead.

Mr. Perelli-Minetti: That communication on May 8th by Mr. Carron would constitute sufficient acceptance. The acceptance—

The Court: By Mr. Sullivan?

Mr. Perelli-Minetti: By Mr. Sullivan. The verbal statement, "I have the papers from Salt Lake and we are going into escrow", and that followed by Mr. Arthur's statement that the deal was off—that of itself is sufficient. Mr. Arthur himself admitted that fact on the witness stand. [206]

The Court: Admitted what?

Mr. Perelli-Minetti: There is no controversy about the question of fact on that particular point.

I will call to your Honor's attention, if I may, in going back to April 24th, that Mr. Carron stated positively on direct examination yesterday that he did call and said, "Hello, Art; congratulations."

The Court: Don't waste any more time about before May 1st. I am satisfied of that. None of these papers are dated before May 5th anyhow by the home office in Salt Lake.

Mr. Mulliner: You see by the agreement the closing date was to be May 15th.

The Court: I know that, but none of them were drawn until after May 1st. None of them were drawn until May 5th and they are dated that date.

Mr. Mulliner: That is correct, your Honor, but the papers were drawn to take effect on the 16th, as provided by the offer.



The Court: Well, yes, to go into escrow before—you say here, at the end of the 14th, before the 15th. Well, I don't know, to me it narrows down to a proposition of whether or not—

Mr. Perelli-Minetti: May I interrupt, your Honor? I don't want to be obstinate.

The Court: Yes. Go ahead and be obstinate. I don't care. I get obstinate myself. [207]

Mr. Perelli-Minetti: I think it is significant that—if I may come back to the 24th—that Mr. Carron testified unequivocally that he called up and said, "Salt Lake accepts it. Salt Lake approves it." Not once, following that—and I think both plaintiffs were on the stand two or three times, I don't recall how many, everybody was rising and getting back—not once was any one of those plaintiffs asked nor did he testify that there was not that conversation. Not once was Mr. Carron asked on cross examination about that conversation. At the same time we have here all the time the continued statements by the plaintiffs to the effect that they were advised that the inventory must precede the acceptance or the considering of an acceptance re rejection by Salt Lake. Yet we also have between the 1st of April and the 24th several conversations asking if Salt Lake had accepted when the inventory had not been taken. Now, they must have known that the inventory was a side issue as far as acceptance was concerned. Otherwise, why would they ask? They knew that there had been no inventory and it was absolutely a useless act. They did not testify that they called up, one of them or both of them, at intervals of a week or two before the 24th, and said, "Let's get on with the inventory." We have nothing of that character. We have, on the contrary, their request as to whether or not there had been an acceptance. It fits in,



your Honor, with the probability. If the inventory was to precede or be a condition to passing upon an acceptance, why, [208] since it was a two-day job, wasn't it taken the first day or two? For the only reason that it was not necessary.

Mr. Mulliner: Or before the signing of the offer.

The Court: All right, go ahead.

Mr. Perelli-Minetti: There was another point your Honor had in mind when I interrupted him.

The Court: Well, that is a point that I think I would like to hear from Mr. Wilson on, and that is the point that you make, that the offer was still open after May 1st and that as a matter of fact the revocation of the offer was not made until after the acceptance on May 8th or May 9th.

Mr. Perelli-Minetti: May 8th, your Honor.

The Court: That is your point, on May 8th, but I don't know whether that can be called an acceptance or not. At least, I would like to hear from Mr. Wilson on it.

Mr. Wilson: These questions, your Honor, that bear upon the subject of acceptance are all addressed to one point, and that is, Was a contract formed? Was an agreement reached? Now, then, in order to reach an agreement it is not only necessary that one party make a decision but also that that decision shall be communicated to the other.

The Court: By someone with authority.

Mr. Wilson: By someone with authority, so that when everything is complete, this legal act that we describe by the word "acceptance" has been performed, both parties stand in reciprocal positions and that each could enforce the [209] contract against the other. If

there is not that certainty which is necessary to any contract then, of course, we do not have a contract.

So, my first point by way of explanation is this, that before we can say that there is or is not an acceptance, we must first find out who made the decision. There is no proof here that any person made any decision.

The Court: Well, it has got to be an acceptance of the offer as made.

Mr. Wilson: Yes, your Honor, that is obviously true. And within the time specified. It is said this offer is not a 30-day offer, that is, that there is no time limit and it does not expire by virtue of its express terms. All I can say is that differences of opinion might well exist with respect to the interpretation of the writing. My own interpretation is that when it says, "The Offerer hereby agrees that this offer shall remain open", that by implication at least he says it shall not remain open after the date specified. There are two conditions specified, namely, the fact that it remains open until the date specified and, furthermore, that it is not revocable until that time arrives. But I interpret this writing to mean that it is an offer for a limited period, and our testimony is that it was so understood. If it justifies the interpretation contended for by the defendant, all I can say of it is that we have here another element of uncertainty which, of course, is fatal to any contractual relationship. [210]

On this matter of authority—and I want to touch that briefly—the acceptance, as we have indicated, must come from a decision by one in authority, who in turn must transmit that decision to the person affected.

I observe in Exhibit 5, this being one of the listings, this sentence:

"All offers are subject to approval by the Executive Committee of Western Loan & Building Company."

Now, suppose that Mr. Carron or some other individual identified with that company in some minor capacity, at least not the Executive Committee, should come along and say or write, "The Executive Committee has done thus and so", that is not proof of the act of the Executive Committee. We must have proof of that corporate act just like we have proof of any corporate act, namely, by somebody who was present and either can tell us what transpired or by an official or appropriate corporate record can certify that such a corporate act took place.

The Court: Well, I think that those requirements of the law are satisfied by the execution of the deed dated May 5th, signed by the vice president and the secretary and bearing the corporate seal and duly acknowledged. I think that on that date I could indulge the presumption that the Executive Committee of the Western Loan & Building Company had approved the sale, but I don't think I could indulge that presumption beforehand because, while it is an officer, the general [211] manager, this is too indefinite, I think, to constitute evidence of acceptance of this deal.

All right, go ahead. Excuse my interruption. I wish I didn't interrupt lawyers so much when they are arguing.

Mr. Wilson: I appreciate your Honor's frankness and I think it is conducive to orderly and expeditious—

The Court: Also conducive to reversals of the Judge.

Mr. Wilson: I have felt and seen it during my experience that if we could understand what the trial judge

wanted us to touch on we might do so more quickly and more efficiently rather than talking to him at random.

The Court: I have often thought that when arguing a case.

Mr. Wilson: Getting back to our question here, my first point is, and I have already said it, that the offer is an offer with an express time limit of 30 days. If that interpretation be not sound, although we have testified that that was our understanding of it, nevertheless we did take steps to bring it to a conclusion before we were informed by anybody.

The Court: I don't go along with you on that interpretation of the offer, and I am inclined to believe that the plaintiffs' interpretation of it was indicated not to be that by their conduct in making the revocation.

Mr. Wilson: Your Honor, I am to blame for that. You cannot charge that to them. They came to me with their troubles and I assumed right off the bat that it was— [212]

The Court: That the first thing was to revoke that offer?

Mr. Wilson: As Earl Rogers one time said, out of a superabundance of caution, I thought, well, if I should be wrong, I will take the other angle and go ahead and make a revocation.

Now, we sent those out on the 8th of May. Assuming that the offer had not yet ended, it did end when we transmitted those revocations or those evidences of revocation.



Mr. Mulliner: May I just suggest to you that I think the law is that in the event of revocation—

Mr. Wilson: Could I continue, Mr. Mulliner, please?

Mr. Mulliner: Pardon me.

Mr. Wilson: The question arises whether Mr. Sullivan is correct or whether Mr. Arthur is correct when he says that Mr. Sullivan—Mr. Sullivan says he called him on May 8th, and assuming he did call on May 8th, there was nothing had from any authoritative course to indicate that there had been an acceptance. On May 8th we had never received any communication from anybody in authority.

The Court: I am inclined to think, counsel, that there was nothing communicated to the defendants of an authoritative acceptance of the offer until the receipt by them of the letter of May 9th, following the putting into escrow of these papers and documents executed by the officials of the Western Loan & Building Company. That, I think, was the first time [213] that the plaintiffs received from the defendants an acceptance of their offer. That is this Exhibit H and that was testified, I think—you stipulated it was received on May 10th. It bears the date of May 9th and it was testified it was put in the mail on May 9th. Following this, the deposit of these papers in escrow I think constituted an acceptance of their offer.

Mr. Wilson: If it was open for acceptance at that time.

The Court: If it was open to acceptance at that time. I don't think it was open to acceptance at that time. I



think that the knowledge of Mr. Sullivan the day before that the telegram had been sent, and the receipt of the telegram before he dictated that letter, was a revocation of the offer before its valid acceptance, and that will be the judgment of the Court.

Mr. Mulliner: Your Honor, may I just have your indulgence for a moment on this? Your Honor has stated that Exhibit I does not indicate that it was an acceptance of this deal. Exhibit I, your Honor will notice, refers to Mr. Sullivan's letter of April 5th. I would like at this time, if your Honor will permit me, to reopen merely for the purpose of introducing that letter. The way the case has proceeded, and the pleadings are so general, your Honor can appreciate it has been difficult to keep track of just what the issues were at every stage of this trial, and I would like merely to introduce that document so that the connection between that [214] and Exhibit I will show in the record.

The Court: Well, I suppose the case can be reopened for that. I don't think it would make any difference in my judgment because, as I have indicated, I think that the acceptance was when it was communicated by the letter of May 9th.

Do you stipulate the case may be reopened for that, subject to your objection as to its—

Mr. Wilson: May I see Exhibit I? I don't happen to have a copy of it. I don't know what it is about. (After examining) Subject to my general objection, I will stipulate that it may be offered now.

The Court: Very well, and it may be admitted in evidence as I-1, subject to the plaintiffs' objections.

[DEFENDANT'S EXHIBIT I-1]

WESTERN LOAN AND BUILDING COMPANY

Inter-Office Stationery  
Oakland Real Estate Sales

To     Mr. C. J. Sumner, General Manager

From   Mr. F. E. Sullivan, California Sales Manager

Date   April 5, 1944

Subject

R.E. 4427 Norman Manor Apts.

R.E. 4430 Norman Manor Annex

San Bernardino, California

Dear Mr. Sumner:

This will advise you that we hold an offer to purchase the above properties, adjoining buildings, on the following terms:

Sale price:     \$86,750.00

Cash:             21,000.00

Balance of     65,750.00 to be paid at rate

of \$591.75 per month including 6% interest. Purchasers to have the privilege of paying additional principal payments of \$4,931.25 in any one calendar year and the entire balance due at the end of 120 months.

We hold a 5% deposit in the amount of \$4,337.50.

The purchasers are Mr. Albert C. Arthur and H. B. and Catherine Estes.

Mr. H. B. Estes is also the broker in the transaction and will receive \$4,000.00 commission from the closing escrow.

(Defendant's Exhibit I-1)

The offer was increased over an original offer of \$85,000.00 to allow for the additional commission and to permit Mr. Estes to participate as buyer. Mr. Arthur, a San Bernardino jeweler, is undoubtedly supplying most of the cash payment, but he and Mr. Estes are associated as owners of other properties, Mr. Estes attending to their operation.

We have contacted these people many times and as the offer represents all the property is worth on the present market we are ordering the independent appraisals by Messrs. Saint and Schmutz. If Mr. Schmutz is not available we will submit the offer with only one appraisal.

We will keep you advised.

Very truly yours,

F. E. Sullivan

California Sales Manager

FES:JW

[Stamped]: Received 8:30 Apr 8 1944 Western Loan & Bldg. Co.

[Endorsed]: Filed Jun. 15. 1945. Paul P. O'Brien, Clerk.

Mr. Wilson: With respect to Exhibit I itself—

The Court: With respect to Exhibit I itself, each objection heretofore made and enlarged in the record is overruled.

Mr. Mulliner: I guess we can stipulate that that is the letter that is referred to in Exhibit I?

The Court: I don't know. Here it is. You have not got Mr. Sullivan here—I mean, the general manager, Mr. Sumner. I suppose that he is the only one who can testify what was in his mind when he wrote that letter.

Mr. Mulliner: If that is the only communication from Mr. Sullivan outlining the deal, I can ask Mr. Sullivan that, [215] unless he is willing to stipulate.

Mr. Wilson: These are all matters that transpired in your office. We don't have any knowledge of it.

Mr. Mulliner: Mr. Sullivan would say that that was the only letter in which he reported this deal to Mr. Sumner at that time or approximately that time.

Mr. Wilson: Subject to my objection to it as incompetent, irrelevant, immaterial, and hearsay.

Mr. Mulliner: And it bears the evidence that it was in the Salt Lake Office. It bears the Salt Lake Office receiving stamp.

The Court: It is in evidence for whatever it is. Your offer is that if Mr. Sullivan were called to the stand he would testify that this is the only letter which he wrote on April 5th which related to this transaction?

Mr. Mulliner: That is right.

The Court: And you will stipulate to that, subject to your objection as to its competency, relevancy, and as to its being hearsay?

Mr. Wilson: And lack of foundation; that he would so testify.

The Court: All right.

Mr. Mulliner: Your Honor, if I could just have one other word, we are particularly anxious to test out one

or two of these legal questions, and so the findings of fact are very important to us here. If it would be of any assistance in [216] working out these findings of fact, we would be willing to order a transcript of the testimony in order that that could be available to determine and discuss those questions. In other words, we would like a record.

The Court: You can do it if you want to. Under the rule the plaintiff is now ordered to prepare the findings of fact and conclusions of law, and under the rule they must be served upon the opposite side, which has five days within which to file objections to them. If you do not have time to do it within five days, I will extend the time at that time. If you want the transcript to help you make your objections you can buy the transcript.

Mr. Mulliner: Your Honor can appreciate my situation, that if this ruling is made on the legal question we are able to be guided by it in our practice.

The Court: I understand thoroughly. You do not need to apologize to me for wanting to make a record to protect yourselves on appeal.

Mr. Mulliner: I appreciate that.

The Court: The judgment is for the plaintiffs, and the plaintiffs' counsel is ordered to draw findings of fact and conclusions of law, and I will make the order now that when they are served upon the defendant he shall have 10 days from that date within which to make any objections.

You understand the rule is that if you order the transcript the original is filed and you receive a copy? [217]



Mr. Mulliner: I didn't know it but I appreciate your Honor telling me.

The Court: The original goes in the file of the court.

Mr. Wilson: May I ask a question? Is there a time limit on the preparation of findings?

The Court: No.

Mr. Wilson: I will try to get them in before the end of this week.

The Court: I won't get a chance to look at them for some time.

Mr. Mulliner: May I say that I appreciate your Honor's permitting me to proceed.

The Court: That is all right. You don't need to express any appreciation at all. I am very happy to extend the courtesy and I thank you for your presentation of the matter. I am sorry I cannot agree with you.

[Endorsed]: Filed Jun. 1, 1945. [218]

[Endorsed]: No. 11075. United States Circuit Court of Appeals for the Ninth Circuit. Western Loan and Building Company, a Corporation, Appellant, vs. Albert C. Arthur and H. B. Estes, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 15, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11075

WESTERN LOAN AND BUILDING COMPANY,  
a corporation,

Appellant,

vs.

ALBERT C. ARTHUR and H. B. ESTES,

Appellees.

APPELLANT'S (1) DESIGNATION OF RECORD  
and (2) STATEMENT OF POINTS ON AP-  
PEAL

To the Above Entitled Court and Paul P. O'Brien, its  
clerk and to the Appellees, Albert C. Arthur and  
H. B. Estes and their attorney, Fred A. Wilson:

Notice Is Hereby Given by the appellant, Western Loan  
and Building Company in connection with its appeal in  
case No. 3815-PH-Civil to this court that following are:

I.

Designation of Record

For the record herein the appellant hereby designates  
for printing the record in its *entirely* as certified to the  
above entitled court by the Clerk of the United States  
District Court, Southern District of California, Central  
Division (which record was prepared by the Clerk of the  
District Court as a full and complete record of all pro-  
ceedings and evidence in this action pursuant to appel-  
lant's Designation of Record on Appeal to the Clerk of  
the District Court dated June 1, 1945).

## II.

### Statement of Points on Appeal

Following is a concise statement by appellant of the points upon which it intends to rely in this appeal:

(a) The rulings, orders and judgment of the trial court appealed from are not supported by the evidence.

(b) The rulings, orders and judgment of the trial court appealed from are against the law.

(c) The failure and refusal of the trial court to make findings of fact upon material issues which were joined. Some of these being:

(1) Did Mr. Carron, in a telephone conversation on April 24, 1944, state to Mr. Arthur that the deal had been approved by the Salt Lake office of appellant company and then arrange for taking the inventory of the furnishings?

(2) Did Mr. Sullivan, by telephone, May 8, 1944, inform Mr. Arthur of the acceptance of the deal by the appellant and of the receipt by Mr. Sullivan of the papers to close the deal, and was his call before or after the receipt by the company of appellees' night telegrams and letters withdrawing their offer?

(3) Considering the offer and the previous transactions with appellees and the escrow instructions and the statement in appellees' bill of particulars concerning the \$4,337.50 deposit, would this have been applied as a payment if the deal had been closed, and was it so intended by the parties hereto?

(d) The evidence does not support the Findings of Fact and Conclusions of Law signed by the trial court.

(e) The Findings of Fact do not support the judgment.

(f) The trial court erred in refusing to admit evidence offered by appellant on the question of liquidated damages and improperly limited the evidence offered by appellant under the general denial in appellant's answer.

(g) The trial court abused its discretion in denying appellant's motion made during the trial for leave to amend its answer by setting up as a special defense that appellant was entitled to keep the \$4,337.50 deposit as liquidated damages.

(h) The trial court erred in rejecting the evidence offered by appellant with respect to prior dealings between the parties in similar transactions involving the same form of offer to purchase as an aid in construing the offer to purchase and the significance of the inventory taking.

(i) The trial court failed to grasp the reason for taking the inventory.

(j) A verbal acceptance is sufficient.

(k) A verbal acceptance of a written offer to purchase land is sufficient to defeat a defaulting purchaser's right to recover the down payment where the vendor is ready, able and willing to complete the sale.

(l) Appellees' offer to purchase did not expire May 1, 1944, but remained open until May 15, 1944.

(m) Assuming (but not conceding) that the offer to purchase expired May 1, 1944 nevertheless appellees by their acts waived this time limit and there was a timely acceptance by appellant thereafter.

(n) Appellees attempts to revoke their offer to purchase followed timely acceptances by appellant and they were, consequently, ineffectual.

(o) The trial court misconstrued the nature of the written offer to purchase and the effect of the provisions contained in the offer to purchase.

(p) The liquidated damage provision in the offer to purchase is a valid provision.

(q) The offer to purchase was sufficiently definite and certain in its description—"furniture, furnishings and equipment".

(r) The trial court erred in denying appellant's motion for a nonsuit.

Dated: June 22, 1945.

H. L. MULLINER & M. PERELLI-MINETTI

By M. Perelli-Minetti

Attorneys for Western Loan and Building Company,  
Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun, 25, 1945. Paul P. O'Brien,  
Clerk.



No. 11075

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

WESTERN LOAN AND BUILDING COMPANY, a corporation,  
*Appellant,*

*vs.*

ALBERT C. ARTHUR and H. B. ESTES,

*Appellees.*

---

APPELLANT'S OPENING BRIEF.

---

M. PERELLI-MINETTI,  
704 South Spring Street, Los Angeles 14,

H. L. MULLINER,  
817 Continental Bank Bldg., Salt Lake City 1, Utah,

*Attorneys for Appellant.*

FILED



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## Jurisdiction.

Jurisdiction in this action is based upon diversity of citizenship and it is conferred by section 2 of article 3 of the Constitution of the United States and by section 28 of the Judicial Code as amended (28 U. S. C. A., sec. 71).

At all times the plaintiffs and appellees were residents of the State of California and the defendant and appellant was a corporation organized under the laws of the State of Utah and a citizen of that state [R. 6 at par. "4", R. 2 at par. "I", R. 25 at par. "a"].

This action was properly removed from the Superior Court of the State of California in and for the County of San Bernardino to the United States District Court in and for the Southern District of California, Central Division, in accordance with the requirements of section 29 of the Judicial Code as amended (28 U. S. C. A., sec. 72). The order of removal by the San Bernardino Superior Court [R. 14-15] was proper in view of the pleadings and bond previously filed by appellant [R. 3-10, 16].

Although the judgment was dated January 27, 1945 [R. 43] it was not signed and entered until February 19, 1945 [R. 42 and minute order of February 19, 1945, at R. 42]. The notice of appeal and the undertaking on appeal were filed May 18, 1945 [R. 44-45, 46] and consequently they were timely (28 U. S. C. A. sec. 230).



No. 11075

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

WESTERN LOAN AND BUILDING COMPANY, a corporation,  
*Appellant,*

*vs.*

ALBERT C. ARTHUR and H. B. ESTES,  
*Appellees.*

---

APPELLANT'S OPENING BRIEF.

---

Statement of Facts.

This action is one by the appellees, as plaintiffs, to recover against the appellant, as the defendant, a deposit delivered by said plaintiffs to said defendant on an agreement to purchase an apartment house.

Appellant, Western Loan and Building Company, is a building and loan company under the jurisdiction of the California Building and Loan Commissioner. The home office of appellant is in Salt Lake City, Utah. The real estate sales department for the State of California is divided into two districts. The Southern California District was represented by James A. Carron through April 29, 1944 with offices at 308 West Olympic Boulevard, Los Angeles, California. The Northern California Dis-

strict was represented by Frank E. Sullivan with offices at 363 15th Street, Oakland, California. Mr. Sullivan was in general charge of all California sales.

The apartment house and furnishings involved in this action is situate in the City of San Bernardino where the two purchasers, Albert C. Arthur and H. B. Estes, lived and maintained their businesses. The Western Loan and Building Company did not maintain an office or representative in the City of San Bernardino.

Virtually all of the material facts are without any conflict. On three material issues, the facts are in conflict. Following is a concise statement of each group.

### **Facts Not in Conflict.**

On April 1, 1944 in the lobby of the California Hotel in San Bernardino the appellees, Albert C. Arthur and H. B. Estes, signed a written offer to purchase from the appellant, Western Loan and Building Company, the Norman Manor and Norman Manor Annex, furnishings and equipment for \$86,750.00, \$21,000.00 of which was payable in cash and the balance of which was payable in installments secured by a deed of trust on the land and a chattel mortgage on furniture, furnishings and equipment. [Plaintiffs' Exhibits 1 and 6 and R. 69, 108, 205, 209, 219.] James Carron, the Los Angeles salesman, for the Western Loan and Building Company [R. 119] advised Messrs. Arthur and Estes that the offer to purchase had to be submitted to Salt Lake (the home office of the Western Loan and Building Company) for approval [R. 126-7, 110].

Mr. Estes, one of the offerors, had been a real estate broker for 15 years [R. 50-51]; with respect to the sale of the Norman Manor Apartments he was a co-purchaser



and also the broker; he was to receive a \$4,000.00 commission [Plaintiffs' Exhibit 6-backside, R. 73]. Mr. Estes had previously dealt with the Western Loan and Building Company in both of these capacities; in 1943 Mr. Estes was one of the purchasers from the Western Loan and Building Company of the Mission Riverside Apartments and some six months prior to that Mr. Estes had, as the real estate broker, negotiated for the Western Loan and Building Company the sale of its Melvin Sherwood Apartments [R. 100-101, 76]. As a result of these prior dealings and the one then pending Mr. Estes knew that the Western Loan and Building Company was a building and loan association under the supervision of the California Building and Loan Commissioner and that the regular procedure required that the property had to be appraised by certain appraisers approved by the Building and Loan Commissioner before the Salt Lake office could approve the sale [R. 86] and that the inventory of furniture, furnishings and equipment was taken so that these articles could be listed in the chattel mortgage given back as security for the unpaid balance by the purchasers [R. 215-16].

Three days after the offer to purchase was signed and on April 4, 1944 F. E. Sullivan, the California Sales Manager for Western Loan and Building Company [R. 153] wrote from Oakland, California, to James Carron in Los Angeles, California, and instructed Carron to have the apartments so appraised [Defendant's Exhibit B, R. 133-134]. The following day, April 5, 1944, Sullivan wrote from Oakland to C. J. Sumner, General Manager of the Western Loan and Building Company, at Salt Lake and advised Mr. Sumner of the offer to purchase (and its terms) and that an independent appraisal had been ordered [Defendant's Exhibit I-1, R. 267-269]. This letter

was received in Salt Lake by Western Loan and Building Company April 8, 1944 and the offer to purchase of Arthur and Estes referred in it (Sullivan's letter of April 5, 1944) was accepted by the Western Loan and Building Company through Mr. Sumner's letter of April 22, 1944 to Sullivan who was then at Los Angeles [R. 270]. This letter follows [Defendant's Exhibit I, R. 196-7]:

"WESTERN LOAN AND BUILDING COMPANY  
Inter-Office Stationery  
Home Office

To Mr. F. E. Sullivan, California Sales Manager  
Los Angeles

From Mr. C. J. Sumner, General Manager

Date April 22, 1944

Subject RE 4427-4430

Norman Manor & Annex

Dear Mr. Sullivan:

Sale of the above properties as outlined in your letter of April 5th is approved.

Enclosed is analysis of operations.

Closing papers will be prepared as soon as you forward the necessary papers to prepare them.

Yours very truly,

C. J. Sumner

General Manager."

CJS:ek

[197]

Mr. Sumner's letter of April 22, 1944 was received in Los Angeles on April 24, 1944 [R. 203-4, 206-7] and thereafter that day Carron on behalf of Western Loan and Building Company, and in Mr. Sullivan's presence, telephoned from Los Angeles to the appellee, Arthur, in San Bernardino [R. 207, 203-4, Defendant's Exhibit F, R.

170-174 at 173], advising him the offer was accepted. It was then arranged to take the inventory.

Prior to April 22, 1944 when Mr. Sumner approved the sale [Defendant's Exhibit I] Salt Lake had in its possession an inventory [R. 239] and the independent appraisal of April 18, 1944 by Geo. L. Schmutz of the entire property covered by the offer of purchase—land, structures, furnishings [R. 238-240]. This appraisal placed a value on all this property of \$80,000.00 [Defendant's Exhibit \$86,750.00 contained in the offer) and of the \$80,000.00, \$6,000.00 was allocated to furnishings "as is" [R. 245].

On the 25th and 26th days of April, 1944 Carron went from Los Angeles to San Bernardino and took a complete inventory with Estes (all the time) and Arthur (part of the time) [R. 148, 211-13, 221]. The inventory necessitated a listing of every article [R. 149] of property in the 42 furnished apartments [R. 222]. It consisted of both sides of 6 large sheets (twice letter size) of paper [Defendant's Exhibit D] each of which were accepted and signed by Arthur and Estes on April 26, 1944 [R. 150, 218].

On the following day, April 27, 1944, Carron delivered the inventory to his office in Los Angeles [R. 152]. This was on Thursday. The data contained in the inventory was to be tabulated [R. 152] and a "recap" was to be made [R. 151]. On the following Saturday at noon, April 29, 1944 Carron left the employ of Western Loan and Building Company. On May 3, 1944 Sullivan sent the typed inventory (the recap) to Salt Lake with a request for the closing papers, which were to consist of the note, deed of trust, chattel mortgage, bill of sale,

deed and insurance policy [R. 156]. These closing papers were sent from Salt Lake on May 5, 1944 [R. 156], and they were received by Sullivan on May 8, 1944 [R. 156]. On said May 8, 1944 he advised plaintiffs that defendant was ready to close. On May 9, 1944 Sullivan personally delivered to the Security Title Insurance and Guaranty Company in San Bernardino escrow instructions in the form of a letter from Sullivan to the title company [R. 158-165, Defendant's Exhibit E] together with the various original instruments (all attached to Defendant's Exhibit E) listed in the instructions [R. 161, 165-166]. The deed and bill of sale conveying to Arthur and Estes the real and personal property which composed the Norman Manor and Norman Manor Annex Apartments and the furniture, furnishings and equipment were properly signed on May 5, 1944 on behalf of Western Loan and Building Company by C. J. Sumner as vice president (also the general manager) and the writer of the letter of acceptance dated April 22, 1944 [Defendant's Exhibit I) and R. B. Ritchie as secretary [R. 166-7]. Arthur and Estes were notified the documents were in escrow on May 10, 1944, but they refused to complete the escrow and the sale [R. 168].

On May 8, 1944 Arthur and Estes, through their attorney, Fred A. Wilson, prepared two letters identical in language which contained in part the following language:

"You are hereby notified that the undersigned, Albert C. Arthur and H. B. Estes, hereby withdraw and revoke their offer, dated April 1st, 1944 to purchase \* \* \* the Norman Manor \* \* \*"



Both letters [Plaintiffs' Exhibit 3, R. 55-56] were mailed to the Western Loan and Building Company from San Bernardino that day—one letter to the Salt Lake office and one to the Los Angeles office, each being received by the particular office at the time indicated by the notation on the letter [R. 103-106]; the letter to Salt Lake being received three days late [R. 105, Plaintiffs' Exhibit 3] and the letter to Los Angeles being received the following day, May 9, 1944 [R. 105, 158, Plaintiffs' Exhibit 3]. The contents of the two letters were also sent by night letter telegrams from San Bernardino to Western Loan and Building Company at Salt Lake and Los Angeles [R. 103-106, Plaintiffs' Exhibit 2, R. 52-54]; the night letter to Los Angeles arrived in Los Angeles at the telegraph office at 10:13 P. M. and was telephoned to the Los Angeles office of the Western Loan and Building Company on the following day, May 9, 1944 [R. 104, 158].

On May 9, 1944, the Salt Lake office of the Western Loan and Building Company sent a telegram to Arthur and Estes in San Bernardino [R. 178-180, Defendant's Exhibit G] in answer to the night letter of revocation [Plaintiffs' Exhibit 2] from appellees. This reads in part:

“Answer your wire your offer to purchase was accepted and you were so notified prior to May  
First \* \* \*

On May 9, 1944 Sullivan wrote by registered mail from Los Angeles to Arthur and Estes in San Bernardino ad-



visting them that the escrow had been opened in San Bernardino and the papers deposited and also

“This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April 24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor Annex Apartments under the terms of your Offer to Purchase.” [R. 180, Defendant’s Exhibit H.]

Arthur and Estes each received duplicate originals of this letter on May 10, 1944 [R. 182].

The Western Loan and Building Company has been willing, ready and able at all times to complete the sale and transfers [R. 191].

Between April 1, 1944 (when the offer to purchase was signed by Arthur and Estes) and April 25, 1944 (when the inventory was commenced) Estes and Arthur each telephoned the Western Loan and Building Company in Los Angeles on several occasions at least to ask if Salt Lake had approved the offer to purchase [R. 213-218, 223-225, 227-228]. When Estes made his inquiries he made no mention of taking an inventory.

“Q. Now, you didn’t say to him at that time, ‘Let’s get busy and take the inventory,’ did you, ‘so that Salt Lake will approve this’? A. No. sir.” [R. 214, Mr. Estes being cross-examined by Mr. Mulliner.]

### Issues in Conflict.

Mr. Carron testified that on April 24, 1944 he telephoned from Los Angeles to Mr. Arthur in San Bernardino and advised him that Salt Lake had accepted the offer to purchase [R. 146-8, 206]. At the same time he made arrangements with Arthur to take an inventory [R. 148]. This testimony by Carron was corroborated by Sullivan who instructed Carron on April 24, 1944 to so advise Arthur and Estes and who listened to Carron make the telephone call [R. 185, 187-9] and also by the telephone bill [Defendant's Exhibit F, R. 170-174 at 173]. Arthur, however, denied that Carron had advised him of Salt Lake's acceptance [R. 115-6, 225-7]. Both Estes and Arthur testified that Salt Lake could not approve the offer to purchase until an inventory had been taken [R. 210, 213, 220-2]. Both Carron and Sullivan testified unequivocally that Salt Lake did not require a taking of the inventory as a condition to acceptance or rejection of the offer to purchase [R. 235-6, 238].

Mr. Arthur did, however, admit that he received a telephone call from Mr. Carron before the inventory was taken [R. 225], and Mr. Estes admitted that Mr. Arthur told him that Arthur had a telephone conversation with Mr. Carron in which Mr. Carron stated that they had accepted the deal [R. 97-98]. He attempted later to qualify this by saying he thought the conversation with Mr. Carron was between the 5th and 10th of May. But the witnesses on both sides testified that they knew Mr. Carron was not with defendant, or had anything to do with this business, after April 29 [R. 152, 221].

Both Arthur and Sullivan testified that on May 8, 1944 (by Sullivan) or on May 9, 1944 (by Arthur) that Sullivan telephoned from Los Angeles to Arthur in San Bernardino and stated that Western Loan and Building Company had accepted and was ready to close. Arthur stated the conversation was on May 9, 1944 [R. 116]. Sullivan testified that on May 8, 1944 he received the closing papers from Salt Lake and that at about 1:30 P. M. of that day (May 8, 1944) he telephoned Arthur and told him he was ready to close the sale [R. 156-8] and that later in the day (May 8, 1944) at about 2:00 P. M. Sullivan telephoned Carron in San Diego [R. 176-7] and that still later that day (May 8, 1944) and at 5:30 P. M. he telephoned Estes [R. 183-4]. Carron corroborated the fact that Sullivan telephoned him in San Diego on May 8, 1944 at about 2:00 P. M. [R. 205-6]. The telephone bill of the Western Loan and Building Company also corroborates Sullivan's testimony [Defendant's Exhibit F, R. 170-4]—the pertinent part of which follows:

Apr

8	Carron	SD—RE	1.10
	5831	SBO—RE	.45
	Arthur	SBO—RE	1.10
	Estes	SBO—RE	.85

[at R. 173]. (Note—RE means the Real Estate Sales Department as distinguished from the Operating Department of the Western Loan and Building Company. These symbols were placed on the telephone bill to permit a proper distribution of costs for accounting purposes.)

## POINT I.

### A Verbal Acceptance Is Sufficient.

Appellant, Western Loan and Building Company, does not base its right to a favorable judgment upon the fact that it accepted in writing the offer to purchase. It contends that on two separate occasions (April 24, 1944 and May 8, 1944), that appellees, Arthur and Estes, were notified orally that their offer to purchase had been accepted. This notice was by and through the same source that their offer had been made, and from the same officers of the company to whom each of them had applied, repeatedly, for notice of the acceptance, and from whom they had expected to receive such notice. Appellant further contends that under the law this is sufficient to defeat a defaulting purchaser in an action to recover the deposit, or part payment, if the vendor is ready, willing and able to perform, as defendant was.

The trial court failed to grasp this and unquestionably based its decision upon the fact that Western Loan and Building Company had not signed anything. This is evident from the court's remarks and questions throughout the entire trial—as when the trial court asked Estes and Arthur if they had received a written acceptance or rejection to the offer to purchase [R. 92 and 115], and when the trial court asked Sullivan if he showed defendant's Exhibit I (the letter of April 22, 1944, from Salt Lake by Sumner and General Manager to Sullivan in Los Angeles approving the sale) to Arthur or Estes [R. 203],

and when at the conclusion of the evidence the trial court stated [R. 266]:

“The Court: I am inclined to think, counsel, that there was nothing communicated to the defendants of an authoritative acceptance of the offer until the receipt by them of the letter of May 9th, following the putting into escrow of these papers and documents executed by the officials of the Western Loan & Building Company. That, I think, was the first time [R. 213] that the plaintiffs received from the defendants an acceptance of their offer. That is this Exhibit H and that was testified, I think—you stipulated it was received May 10th. It bears the date of May 9th and it was testified it was put in the mail on May 9th. Following this, the deposit of these papers in escrow I think constituted an acceptance of their offer.” [R. 266.]

and when the trial court stated:

“The Court: But you didn’t tell them before the 1st except that if Mr. Carron’s communication is an acceptance.” [R. 254],

and when the trial court stated:

“The Court: If the offer had been accepted before the date of the inventory, it would have been a very easy thing [R. 201] to have communicated the formal acceptance and opened an escrow and demanded the inventory in the escrow if it was not the intention of the parties to say that this inventory was taken to be submitted to Salt Lake City before it was finally accepted.” [R. 256],

and when the trial court stated:

“The Court: If it had been accepted Mr. Carron or somebody would also have had authority to sign



this inventory with these parties here, if the deal had been accepted when this inventory was taken, but the fact that nobody signed this for the Western Loan and Building Company right while they were taking it and looking at it is an indication to me that it was not accepted." [R. 256-7.]

and when the trial court stated:

"The Court: Don't waste any more time about before May 1st. I am satisfied of that. None of these papers are dated before May 5th anyhow by the home office in Salt Lake.

Mr. Mulliner: You see by the agreement the closing date was to be May 15th.

The Court: I know that, but none of them were drawn until after May 1st. None of them were drawn until May 5th and they are dated that date." [R. 260],

and when the trial court stated:

"The Court: All right. I think, Mr. Wilson, that I would like to hear from the defendants in connection with the matter. I have read your briefs and memorandums submitted in connection with this. Will you touch in your argument on the proposition as to how under the law, assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was—how that constitutes an acceptance when there was then no inventory, nothing upon which a bill of sale could be drawn, when there was never anything which was given to the plaintiffs in writing signed by any official or any person representing or purporting to represent the Western Loan & Building Company, whatever its name is?" [R. 248.]

Ever since Carron's oral notification to Arthur on April 24, 1944, Western Loan and Building Company has stood ready, willing and able to complete the sale; this is sufficient.

Perhaps the leading California case in a situation of this character is *Laffey v. Kaufman*, 134 Cal. 391 (66 Pac. 494). In the *Laffey* case there was nothing in writing—neither an offer nor an acceptance. Defendant had agreed orally to convey to plaintiff one-half acre for \$1500.00, \$500.00 of which was paid down. The balance was to be paid later. The purchaser (the plaintiff) refused to complete the contract and demanded back the down payment. The trial court had held that the contract being oral was void and rendered judgment for plaintiff for the return of the \$500.00 payment. The Supreme Court, however, reversed the trial court and rendered judgment for the defendant (the vendor). The Supreme Court's language (p. 393) follows:

"We think the court was in error in overruling the demurrer and in refusing to hear defendant's evidence. The action is not one to enforce the specific performance of a parol contract for the sale of lands, nor is it one in which a defense is based upon the statute of frauds.

The plaintiff, having made the contract, which is not unlawful nor against public policy, and having paid the money thereunder, cannot, of his own volition, and without fault of defendants, come into court and receive the assistance thereof to recover the money voluntarily paid. The money was paid for a valid consideration, to wit, the agreement to convey the land."

“The right of the vendee of land, under a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part. (Browne on the Statute of Frauds, sec. 122; 2 Reed on the Statute of Frauds, sec. 738; Wood on Frauds, sec. 235; *Abbott v. Draper*, 4 Denio, 51; *Green v. Green*, 9 Cow. 46; *Coughlin v. Knowles*, 7 Met. 57; *Wetherbee v. Potter*, 99 Mass. 354, 361.)”

The *Laffey* case has been referred to with approval many times by the California courts. It is still the law of California. See *Walbridge v. Richards*, 212 Cal. 408, 413 (298 Pac. 985).

The Statute of Frauds (California Civil Code sections 1624, subdivision 4 and California Code of Civil Procedure section 1973, subdivision 4) presents no difficulty; nor does any theory of lack of mutuality—based upon the fact that the Western Loan and Building Company did not sign the written offer to purchase and therefore can't be bound. *Harper v. Goldschmidt*, 156 Cal. 245 (104 Pac. 451), is a complete answer to both of these points.

*Harper v. Goldschmidt* involved an action by the vendor to enforce the specific performance of a contract for the sale of land where the purchaser had not signed a contract of sale or memorandum. At the time the oral agreement was made the purchaser (defendant) paid \$250.00 on account and received in return from the vendor (plaintiff) a receipt reciting that the money was part payment and also reciting that the purchase price of the lot which was described was \$1400.00 payable in a fixed way. The court properly held that since the

purchaser had not signed the contract of sale specific performance could not be had. In making that decision the Supreme Court of California set out the true nature of the Statute of Frauds in the following language:

At page 248 of the official report:

“The English statute of frauds and perjuries of Charles II to which the similar statutes of all our states owe their origin, used the phrase ‘party to be charged’ in precisely the same manner and to the same effect as it is now used in our sections of the code. A glance at the English cases will establish that the ‘party to be charged’ did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant. (1 Sugden on Vendors, chap. 4, sec. 3, par. 2; Thornton v. Kempster, 5 Taunt. 786; Allen v. Bennett, 3 Taunt. 169; Seaton v. Slade, 7 Ves. Jr. 265.) It was not the vendor alone whom the statute of frauds and perjuries sought to protect, but the vendee equally.”

At page 249:

“Before the statute of frauds, an oral agreement could be proved against either party. The statute of frauds in no way interfered or attempted to interfere with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged.”

At page 251:

“In equitable theory the requirement of mutuality of remedy is satisfied when the non-signing plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in



chancery and so empowers that court to decree specific performance against him. The commencement of his action is his offer to perform, and the precise situation is met and covered by the provisions of section 3388 of the Civil Code, which declares that. 'A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.' (Bird v. Potter, 146 Cal. 286 (79 Pac. 970).)"

Although the appellant has not sought to compel specific performance it could have done so and the foregoing quotation from the *Goldschmidt* case show that the trial court's fears that the Statute of Frauds had been violated are groundless.

## POINT II.

### The Provision for Liquidated Damages in the Offer to Purchase Is Valid.

The principle established by the case of *Laffey v. Kaufman* (134 Cal. 391; 66 Pac. 494) cited at page 14 of this brief entitles Western Loan and Building Company to retain the \$4,337.50 deposit and part payment. The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73], however, for the reasons set forth in the third paragraph [R. 70] provide that the Western Loan and Building Company may retain any deposit as liquidated damages under the conditions there specified. This may raise the question (improperly because of the *Laffey* case) as to whether or not the provision for liquidated damages is valid.

Although the trial court repeatedly and improperly rejected the evidence and the offers of proof made by



the Western Loan and Building Company on this question (see Point IX, page 50 of this brief) the liquidated damage provision is valid.

Section 1671 of the California Civil Code provides:

“Exception. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.”

The leading case in California construing similar provisions in cases like the one at bar is *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1 (55 Pac. 713).

In the *Glock* case the plaintiff agreed to buy some land for \$625.00. Plaintiff paid \$125.00 down and was to pay an additional \$125.00 annually thereafter in addition to interest and to reimbursing the defendant (the vendor) the cost of planting trees. Time was of the essence in the contract and after the time limits had passed the plaintiff tendered the balance of the purchase price to the defendant who rejected it. Plaintiff then demanded the return of the money previously paid by him—\$382.50 on account of the purchase price. The agreement provided that if plaintiff failed to perform, that any payments made were to be forfeited by plaintiff as liquidated damages. The Supreme Court rendered judgment for the vendor (the defendant) upholding for the first time in California the right of a vendor not in default to retain the money paid as liquidated damages in cases like the one at bar.

The reports are full of similar holdings. In *Petersen v. Bunting*, 43 Cal. App. 707 (hearing in the Supreme

Court denied) the court held that the vendor was entitled to retain as liquidated damages \$10,000.00 down payment made by plaintiff on a \$40,000.00 land purchase contract. In *Hawes v. Lux*, 111 Cal. App. 21 (hearing in Supreme Court denied) the court held that the vendor was entitled to retain a \$7,000.00 deposit paid by plaintiff on account of a \$68,100.00 purchase price of a home. In this case as well as in the *Petersen* case the defendant was ready, willing and able to perform. In the *Hawes* case in denying the purchaser (the plaintiff) the return of his money, the court states at page 24:

“The deposit receipt provided for the retention by appellants of the amount paid in the event of the failure of respondent to pay the balance, but even in the absence of such express provision it is well settled that the seller is entitled to retain the payments made prior to the unexcused default of the purchaser. (*Tuso v. Green*, 194 Cal. 574 (229 Pac. 327); *Glock v. Howard*, 123 Cal. 1 (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); 25 Cal. Jur. 797).”

In *Francis v. Shrader*, 38 Cal. App. 592 (hearing in the Supreme Court denied) the court permitted the vendor of some oil-bearing land to retain the \$15,000.00 as liquidated damages which had been paid by the purchaser (defendant) on account of the \$70,000.00 purchase price. In this action the vendor as plaintiff brought an action to quiet title to the property and the purchaser as defendant cross-complained. In rendering judgment for plaintiff and denying the purchaser the right to the return of his \$15,000.00 the court at page 597 sums up the position

of the purchaser, which is identical with that taken by plaintiffs in the case at bar and then rejects that position:

“The defendants (purchaser) stand upon the bald proposition that, the contract of sale not being completed or consummated, though through no fault of the plaintiff (vendor) and the latter having received a large sum of money on the purchase price, said money ought to be returned to them before they are required to give up possession of the property, notwithstanding that the Oil Company, vendee in possession, refused to go on with the fulfillment of the terms of the agreement.”

\* \* \* \* \*

“Counsel for the plaintiff, in their brief, well and succinctly state the law in this state respecting the rights of the parties to contracts such as the one involved herein as follows: ‘It is now the settled law of this state that a vendee under a contract for the purchase of real property cannot continue to hold the possession thereof after making default in the payments as therein provided, regardless of whether the vendor has title or not; and that the vendee cannot refrain from making payments as by the contract provided, and also continue to hold possession of the land; nor can the vendee under any circumstances be entitled to the return of the money by him theretofore paid thereunder while he continues to hold possession of the land; nor can the vendee after making default in his payments without legal excuse ever recover the return of any of the money he may have paid thereon when the vendor was not in default of anything on his part to be kept and performed, except when there has been mutual rescission.’” (Citing *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 10 *et seq.* and other cases.)

### POINT III.

#### **The Offer to Purchase Was Definite and Certain.**

The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73] covers the sale of the Norman Manor and Norman Manor Annex Apartments and the "furniture, furnishings and equipment." [R. 71.] The land is described in the customary manner by lot, block and tract, and the "furniture, furnishings and equipment" in that exact language.

The trial court clearly indicated that this was an inadequate description and its language follows:

"The Court: I really don't think, counsel, under the evidence, and I have followed it very carefully, that there was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don't see how you are going to give a bill of sale and a chattel mortgage until you have an inventory and know what is going to be in the bill of sale."  
[R. 255-6.]

Two misconceptions are immediately apparent from this remark. In the first place the terms of the offer to purchase do not provide that the acceptance of the Western Loan and Building Company must be made simultaneously with the delivery of the bill of sale and the chattel mortgage. On the contrary the offer to purchase refers to "close of escrow." [R. 72.]

The escrow supplied the mechanics by which the accepted offer was to be carried out and was for the purpose of protecting both parties to the transaction pending title search, preparation of the deed, bill of sale, chattel mortgage, etc. We know of no theory of law which conditions an acceptance upon the subsequent and mechanical act of executing the appropriate documents.



In the second place the description "furniture, furnishings and equipment" is adequate, definite and certain. If the Western Loan and Building Company executed or were to execute a bill of sale in the following language

"In consideration of the sum of \$10.00 the receipt of which is hereby acknowledged, the Western Loan and Building Company hereby sells and transfers to Albert C. Arthur and H. B. Estes all the FURNITURE, FURNISHINGS AND EQUIPMENT presently situate . . . ,"

it would have been sufficient. No law requires the seller to itemize in the bill of sale every screw driver, rag, chair, inkwell, pillow case, etc. that is part of an operating apartment house.

In *Ross v. Frank*, 13 Cal. App. 88 at page 89 the court upheld a contract providing for the sale of

". . . all of the French prunes now on the trees or being picked and dried from the Ross Orchard on the Soap Lake Road at Prunedale, estimated at about 35 tons more or less when dried, . . . ."

In *Houghton Co. v. Kennedy*, 10 Cal. App. 426 (102 Pac. 533 hearing in Sup. Ct. denied) the court ruled against the seller where he sought to remove a barn from land sold involving a written instrument executed by seller containing the following language at page 427:

". . . assigned and transferred and delivered unto the Houghton Company, a corporation, all of their right, title, estate, claim or interest in or to all of the following described personal property and appurtenances to real estate, to wit: all of the fences and buildings of every description, and all engines, pumps,



appurtenances and pipelines, scales, watering troughs and other property and appurtenances of like character and description, all situated upon or connected with the lands and property described in a certain lease between J. F. Houghton and J. W. Kennedy, dated October 1st, 1901, and the lands and property described in a certain trust deed from said J. W. Kennedy and wife to H. B. Houghton and H. F. Gordon, trustees for J. F. Houghton, dated the 15th day of December, 1898, and recorded in volume 220 of Deeds, page 430 *et seq.*, Fresno County Records; together with and including all of the connections and appurtenances used in connection with said property situated upon said lands, or in the vicinity thereof, including any such property situated upon or extending through or under the townsite of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof.”

The specific words of the court being (at page 428):

“It is the concluding language of the assignment that covers the barn, to wit: ‘Including any such property situated upon or extending through or under the townsite of Rolinda, or through or under the streets, roads or highways thereon, or in the vicinity thereof.’ The words ‘any such property’ refer to such property as had before been enumerated, which includes ‘buildings of every description,’ and the entire clause brings within the operating words of the assignment buildings of every description situated upon the townsite of Rolinda or in the vicinity thereof. We are unable to fairly read the words of the assignment in any other sense.”

In *Northwestern Paper Co. v. Concord Paper Co.*, 214 App. Div. 537 (212 N. Y. S. 318) (affirmed in 242 N. Y.

562) the court held that there was a sufficient description in a contract of sale which read:

“ . . . all of the paper in rolls now stored at warehouse . . . ”

In *McIllmoil v. Frawley Motor Co.*, 190 Cal. 546, the court upheld a contract which provided:

“I will buy a new Mitchell car.”,

although no reference was made to model or price. In so ruling the court stated at page 549:

“The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained. (*Sutless v. Seidenberg, S. & Co.*, 132 Cal. 63 (64 Pac. 131, 469)). The description of the subject matter of agreement may be indefinite, and yet if it is capable of being identified and rendered definite and certain by evidence *aliunde* the contract is enforceable. (*Mebius & Drescher Co. v. Mills*, 150 Cal. 229 (88 Pac. 917); *Elliott on Contracts*, sec. 179).”,

and at page 552:

“It thus appears that the contract herein is identical in all essential respects with that which was held valid and binding, in *Mebius & Drescher Co. v. Mills*, 150 Cal. 229 (88 Pac. 917). As was there said, by way of illustration: ‘Reduced to simpler terms, if a man should say to a seller, “I will take from you three dozen pocket-knives of one or all of three described kinds,” the price for each kind being specified, “but I want you to agree to give me a week in which to determine which of the kinds I will select,” it would come with some astonishment to a merchant to

be told that such an agreement was void in law for uncertainty. It is probably safe to say that a million of such transactions take place every month throughout the country, without question or the possibility of question as to the legality of the agreement.' ”

The total sales price involved in the offer to purchase is \$86,750.00. The furniture, furnishings and equipment had a value of \$6,000.00 [Defendant's Exhibit K, R. 241-247 at 245 under the heading “Furnishings as is”] thus leaving a value of \$80,750.00 for the real property. The real property was described by lot, block and tract and it was, therefore beyond any question, described with definiteness. Assuming an uncertainty (but not granting) existed as to the furniture, furnishings and equipment the law is well established that the contract will not be held void for uncertainty of description under these circumstances.

#### POINT IV.

#### **The Terms of the Offer to Purchase Provided That It Was to Remain Open Until May 15, 1944.**

The offer to purchase [Plaintiff's Exhibit 6, R. 69-73] contains the following two provisions:

“The Offerer (Arthur and Estes) hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected or accepted \* \* \*” [R. 70].

“\* \* \* closing date May 15, 1944.” [R. 72.]

Every provision in a contract or instrument must be given a meaning if possible. This rule is so well established we shall not burden the court with citations. Giv-

ing both provisions meanings which are harmonious we must find that the offer by its terms:

- (a) was irrevocable until May 1, 1944, and
- (b) that from May 1, 1944 to May 15, 1944 it was revocable until accepted.

The offerors, Arthur and Estes, placed this very construction on the offer and they cannot change that position now.

Estes testified:

“I went into his office (the office of Mr. Wilson, attorney for Arthur and Estes) to notify Salt Lake that WE WERE WITHDRAWING our offer.” (Our small caps.) [R. 102.]

This visit by Estes occurred on May 8, 1944 or 8 days after the offer ceased to be irrevocable. [Mr. Wilson’s stipulation that he was interviewed by Mr. Estes on May 8, 1944 and instructed to draft letters revoking the offer. [R. 103-104.]

When Mr. Estes stated that on May 8, 1944 “*We were withdrawing our offers*”, he stated in very concise language that which he or another might have said in the following words:

“Our offer doesn’t expire until May 15, 1944. We can revoke it, however, now that May 1, 1944 has passed. Therefore I shall instruct our attorney, Mr. Wilson, to prepare the necessary paper to revoke our offer.”

Following this visit on May 8, 1944 by Mr. Estes to Mr. Wilson's office, the latter, as attorney, prepared two letters [Plaintiffs' Exhibit 3, R. 55-56] revoking the offer. These letters contained identical language and both were signed by Arthur and Estes, one was sent to the Western Loan and Building Company at Los Angeles and the other to Salt Lake.

These letters contain the following language:

"You are hereby notified that the undersigned Albert C. Arthur and H. B. Estes, *hereby withdraw and revoke their offer \* \* \**" (italics ours) [R. 55 and 56].

"Hereby withdraw and revoke" means revoke now, to cancel that which was existing and alive at the time. If Arthur and Estes did not believe that their offer was open after May 1, 1944 and until May 15, 1944 their letter would have been something like the following:

"Our offer to you dated April 1, 1944 to purchase \* \* \* expired May 1, 1944. You failed to accept the offer prior to May 1, 1944. Accordingly we are entitled to the return of our deposit in the amount of \$4,337.50 which we shall expect by return mail.

. Yours truly,"

The two telegrams of revocation [Plaintiffs' Exhibit 2, R. 53-54] contained the identical language as the letters and like the letters one was sent to appellant at Los Angeles and the other to Salt Lake. These telegrams simply emphasize the fact that the offer was open as late as May 8, 1944.



POINT V.

Regardless of Any Time Limit Which May Have Been Fixed by the Terms of the Offer to Purchase the Offerors, by Their Conduct Waived That Time Limit Until Salt Lake Had Accepted.

Even though we accept at face value the testimony of Arthur that Carron did not advise him in their telephone conversation of April 24, 1944, that Salt Lake had accepted the offer to purchase and that during the taking of the inventory that Carron told Arthur that Salt Lake had not yet accepted and the testimony of both Estes and Arthur that they were each told by Carron or Sullivan that an inventory must be taken before Salt Lake was in a position to accept or reject the offer (all of which is the exact opposite of the true facts), still the trial court erred in not finding that Salt Lake had accepted while the offer was open.

The offer to purchase [Plaintiffs' Exhibit 6, R. 69-73] provides in part that:

"The undersigned offerer (Arthur and Estes) understands and agrees that upon receipt of this offer and pending approval and closing that other sales may be lost to the owner, Western Loan and Building Company; that the Owner will at once commence investigation hereon, cause appraisals to be made and an examination by its Executive Committee to be had, that some time and substantial expense will be required, and that the exact loss and expense to owner cannot be determined. \* \* \* The offerer hereby agrees that this offer shall remain open and irrevocable to and including May 1st, 1944, unless sooner rejected \* \* \*'" [R. 70].

The offer to purchase was more than a mere offer which is to be accepted or rejected by Western Loan and Building Company. Along with the offer is the collateral agreement by which the offerers agree that the offer shall remain irrevocable until May 1, 1944 in return for which Western Loan and Building Company was to undertake certain obligations. These were that Western Loan and Building Company

- (a) "at once commence an investigation \* \* \* and"
- (b) "cause appraisals to be made and"
- (c) "an examination by its Executive Committee to be had"

The acceptance by Western Loan and Building Company of the \$4,337.50 constituted an implied promise by Western Loan and Building Company that it would undertake to perform each of these acts, and Western Loan and Building Company did each of these things; an independent appraisal of the property was made on April 18, 1944 by George L. Schmutz, Realtor Appraiser, at 4725 Ledge Avenue, North Hollywood [R. 238-40, Defendant's Exhibit K, R. 241-247], an investigation was made by H. B. Scudder, a director of the Western Loan and Building Company [R. 193 and Defendant's Exhibit J for identification improperly rejected in evidence] and the Executive Committee undoubtedly made its examination for Sullivan testified without contradiction that Sumner, the General Manager, advised him to close the sale [R. 201, Defendant's Exhibit I, R. 197], that Sumner was a member of the Executive Committee [R. 195] and that this procedure had been followed in 500 sales in California [R. 202]; and it must be implied also from the execution and receipt by Sullivan of the deed, bill of sale,

chattel mortgage, etc., on May 8, 1944 [R. 156] all of which were duly executed by the Vice President and Secretary of Western Loan and Building Company [R. 165-167, Defendant's Exhibit E].

The doing of each of these acts by Western Loan and Building Company constituted sufficient consideration moving from the Western Loan and Building Company to Arthur and Estes or a sufficient detriment to Western Loan and Building Company to support this collateral agreement to make the offer irrevocable until May 1, 1944.

Even without this consideration or detriment the offer would have been irrevocable.

"An attempt is sometimes made to prevent the revocation of an offer by requiring the offeror to deposit money or a check at the time of making the offer. It is evident that this cannot make the offer irrevocable since the offeror receives no consideration and the offeree parts with nothing. But if the offeror withdraws his offer, and the understanding of the parties has been made clear that the deposit is to be forfeited if the offer is revoked, the agreed consequence would follow the revocation."

(Williston on Contracts, Rv'd Ed., Vol. 1, at 181.)

Once Western Loan and Building Company commenced performing its part of this collateral by having appraisals, etc., Arthur and Estes were compelled to await acceptance or rejection until May 1, 1944 under the language of the offer. Under the circumstances here they waived that deadline and authorized Western Loan and Building Company to accept the offer to purchase within a reasonable time after May 1, 1944. Western Loan and Building Company accepted within this reasonable time.

This is good law and again we cite Williston on Contracts, Rv'd. Ed. Vol. 1, section 53, page 151:

“\* \* \* Not infrequently an offeror who has imposed a limit of time in his offer does not care to insist upon it and by further negotiations may indicate a continued willingness to stand by the terms of his offer. Any such manifest action of continued willingness is in effect a new offer, which may be accepted and if accepted will ripen into a contract.”

and, also a very recent case by the Supreme Court of Idaho.

“So far as appellants are concerned, the record presents two questions, which will be disposed of in the following Order:

1. Did Ralph fail to exercise the option within the terms of the option agreement?
2. Was the allowance by the Court for the use of the premises by White for mining purposes excessive?

The record supports conclusion that Ralph exercised the option within the time fixed therein and extension thereof by mutual agreement of the parties.

By reason of White's acts and conduct he is not in position to successfully contend that the option was not extended beyond the time fixed in the option. The rule is established that the time fixed in an option may be extended by the acts and conduct of the parties thereto.

“However, notwithstanding time is generally of the essence of an option, the parties may waive the requirement of performance within the time stipulated either expressly or by their conduct.” 66 C. J., p. 504, sec. 28. (*White v. Ralph*, 154 Pac. Rp., 2nd Series 167, at page 169, Idaho Supreme Court, December, 1944, ..... Idaho .....)



The following facts bring our case within the above principle.

Before the inventory was taken on the 25th and 26th of April, 1944 Arthur asked Carron several times if Salt Lake had accepted [R. 223-4] as did Estes of Carron or Sullivan [R. 214-217]. Then Arthur testified that Carron arranged with him by telephone to take the inventory [R. 225 and 227]; this was the conversation Carron identified as occurring on April 24, 1944 [R. 146-7, Defendant's Exhibit F, R. 170-174 at 173].

On the 25th and 26th of April, 1944 Carron and Estes took the inventory of all furniture, furnishings and equipment [R. 148-149]. There were 42 furnished apartments [R. 222]; all apartments were occupied [R. 237], the inventorying required working during the evening of the 25th [R. 148]; both Arthur and Estes testified the taking of the inventory was required before Salt Lake could accept [R. 210, 213, 221-2], Estes testified that Salt Lake had to approve the inventory [R. 213], Estes testified that after the inventory was taken "Salt Lake would have to send their escrow instructions from Salt Lake to the Title Company" [R. 218]. Estes testified that after the inventory was taken that

" . . . we (Arthur and Estes) wanted to rush it (the sale) through as fast as possible", [R. 218].

Arthur testified that when Estes and Carron brought him the inventory for signing that Carron said that they would have to wait for information from Salt Lake and that Sullivan would advise them (Estes and Arthur) of



Salt Lake's action since he (Carron) "was leaving the company" [R. 221].

There is not one single bit of testimony from Arthur or Estes or from any other witness to the effect or implication that Salt Lake had to get the closing papers back to California prior to May 1, 1944. It was understood this could not be done.

The inventory [Defendant's Exhibit C] filled both sides of six large sheets of paper (twice letter size) listing one by one and apartment by apartment every piece of linen, furniture, cooking utensils, china, etc. It was completed Wednesday, April 26, 1944. On the following day, Thursday, April 27, 1944, Carron delivered the inventory to his office in Los Angeles [R. 152] to be tabulated and to make a recap [R. 151]. This was to correlate the data so that the bill of sale and chattel mortgage could be prepared, as Estes testified he knew [R. 215-216]. On the following Saturday at noon, April 29, 1944 Carron left the employ of Western Loan and Building Company. On May 3, 1944 Sullivan sent the typed inventory (the recap) to Salt Lake with a request for the closing papers, which were to consist of the note, deed of trust, chattel mortgage, bill of sale, deed and insurance policy [R. 156]. These closing papers were sent from Salt Lake on May 5, 1944 [R. 156] and they were received by Sullivan on May 8, 1944 [R. 156]. On May 9, 1944 Sullivan personally delivered to the Security Title Insurance and Guaranty Company in San Bernardino escrow instructions in the form

of a letter from Sullivan to the title company [R. 158-165, Defendant's Exhibit E] together with the various original instruments [all attached to Defendant's Exhibit E] listed in the instructions [R. 161]. The deed and bill of sale conveying to Arthur and Estes the real and personal property which composed the Norman Manor and Norman Manor Annex Apartments and the furniture, furnishings and equipment were properly signed on May 5, 1944 on behalf of Western Loan and Building Company by C. J. Sumner as vice president (also the general manager) and the writer of the letter of acceptance dated April 22, 1944 [Defendant's Exhibit I] and R. B. Ritchie as secretary [R. 166-7]. Arthur and Estes were notified the documents were in escrow on May 10, 1944, but they refused to complete the escrow and the sale [R. 168].

There wasn't one thing that the Western Loan and Building Company could have done faster. Everything Western Loan and Building Company did was done as fast as was humanly possible, and it was done when Arthur and Estes expected it to be done—and within a reasonable time after they indicated that the time limit on the irrevocable offer would be extended to permit Western Loan and Building Company to act upon the inventory. No legal basis nor any moral concept can be invoked by Arthur and Estes which will enable them to justify the attempted revocation of their offer.

## POINT VI.

The Inventory Had No Connection With Salt Lake's Acceptance and it Was for the Sole Purpose of Permitting the Western Loan and Building Company to Take an Enforceable Chattle Mortgage Back as Partial Security on the Unpaid Balance of the Purchase Price (\$65,750.00).

Under Point III (beginning at page 21 of this brief) we have shown beyond question that the description "furniture, furnishings and equipment" was sufficiently definite and certain.

The Western Loan and Building Company had an independent state appraisal of the property prior to April 21, 1944 [R. 239—the appraisal of Schmutz dated April 18, 1944, Defendant's Exhibit K, R. 241-7] which covered all land, structures and other physical inventory. This inventory placed a value of \$80,000.00 on the property [R. 242] or \$6,750.00 less than the sales price contained in the offer to purchase. If the sale had been 100% cash the inventory taking of the 25th and 26th of April, 1944 would have been senseless and purposeless.

The sale was largely on credit and Western Loan and Building Company needed an accurate inventory in order to prepare a bill of sale and a chattel mortgage back. Estes admitted this [R. 215-216].

At one time we thought the trial court understood this when it remarked:

"The Court: \* \* \* Everybody knows that is the purpose in taking an inventory. You have got to have an inventory to have a chattel mortgage" [R. 216].

Subsequently, however, the trial court changed its position when it remarked:

“The Court: I really don’t think, counsel, under the evidence, and I have followed it very carefully, that there was any acceptance of this offer before May 1st. In the whole nature of the transaction, I don’t see how you are going to give a bill of sale and a chattel mortgage until you have an inventory and know what is going to be in the bill of sale” [R. 255-256].

The testimony of both Arthur and Estes also shows that neither believed the inventory was a condition precedent to Salt Lake’s acceptance. Arthur testified in his deposition (although to the exact contrary on cross-examination) that between April 1, 1944, when the offer was signed, and April 25, 1944, when inventory taking started, that he asked Carron on several occasions if Salt Lake had accepted [R. 223-225]; Arthur also asked Carron if Salt Lake had accepted when Carron telephoned him to arrange for taking the inventory [R. 225-227] and again when Carron, Estes and Arthur lunched at the “Carnation Place” [R. 227] which Estes fixed as occurring on April 25, 1944 “the morning we took the inventory” [R. 212]. Arthur also testified:

“I would keep on asking (about Salt Lake’s acceptance) him (Carron) every time I saw him.” [R. 227],

because he (Arthur) thought it (the sale) might have gone through [R. 228].

Estes had a little difficulty with respect to these same questions and he testified first on direct examination that he did not recall asking Carron or Sullivan prior to the



inventory taking if Salt Lake had accepted [R. 211], then on cross-examination he stated that about ten days after April 1, 1944 that he asked Carron or Sullivan if Salt Lake had accepted [R. 214] and again about a week later [R. 214] making two times prior to April 25, 1944; then Estes changed the times of asking and fixed them as occurring after the inventory had been taken [R. 214]; then Estes was confronted with his deposition and he admitted he called Carron or Sullivan several times prior to April 25, 1944 to see if Salt Lake had accepted [R. 216-217]. And with reference to this same line of cross-examining Estes testified:

“Q. Now, you didn’t say to him at that time, ‘Let’s get busy and take the inventory,’ did you, ‘so that Salt Lake will approve this’? A. No, sir” [R. 214].

There is one conclusion only that can be drawn from the foregoing testimony of Arthur and Estes and that is that both knew that Salt Lake could accept the offer to purchase prior to the taking of the inventory, and their testimony that both Carron and Sullivan had advised them to the contrary is just not true, for in no way can their two sets of testimony and acts be reconciled.

Carron specifically denied that he had ever told Arthur or Estes that the inventory had to be taken and sent to Salt Lake before it could accept [R. 235-236] as did Sullivan [R. 238]. Their testimony (Carron and Sullivan) is the only testimony that is logical, probable and fits the facts and the trial court was compelled to accept it.

Carron was leaving the employ of Western Loan and Building Company as of May 1, 1944 and his last day of labor was April 29, 1944. If the taking of the in-



ventory was essential to Salt Lake's acceptance wouldn't it have been taken immediately after the offer to purchase was signed on April 1, 1944? Why did plaintiffs expect the offer to be accepted before the inventory was taken?

The Western Loan and Building Company had many apartment houses for sale; there had been 500 sales of various kinds in California [R. 202]. Inventory taking in furnished apartments is a tedious and drawn-out job. No concern could afford to take the time, disturb the tenants and worry apartment house managers and help about possible loss of jobs every time an offer to purchase came during a period of an active real estate market. This was a major operation and would be undertaken, as Carron and Sullivan both testified, only after a firm agreement for sale had been reached.

The blanket story advanced by Arthur [R. 231-233] was simply an attempt to bolster his prior testimony concerning the purpose of the inventory. The story was flatly denied by the two men (Carron and Sullivan) who were in a position to know [R. 237, 238] and it simply further discredits the already weak testimony of Arthur and Estes.

Like all concerns operating in different states the Western Loan and Building Company had developed an established procedure in handling its sales [R. 201-203 and the requirements relative to investigation, appraisals, etc., called for in the form offer to purchase, Plaintiffs' Exhibit 6, at R. 70]. Estes had been a real estate broker for 15 years [R. 50-51]; in 1943 he was a co-purchaser from Western Loan and Building Company of the Mission Riverside Apartments and six months before that he had acted as the broker in the sale by Western Loan and Building Company of the Melvin Sherwood Apart-

ments [R. 100-101, 76]. As a result of these prior dealings he knew the established practice of the Western Loan and Building Company.

The Western Loan and Building Company was entitled to show that the inventory was not taken until Salt Lake had accepted the offer in those two transactions. The trial court rejected this evidence and the offer of proof.

“Mr. Mulliner: Your Honor has ruled on it, but I offer to prove by Mr. Sullivan, who is here and has been sworn, that on both the Sherwood Melvin deal, handled by Mr. Estes, and the Mission Riverside deal, also handled by him, and in which (151) he was a purchaser, that the deposit, the earnest money deposit such as we have involved in this action, was applied upon the purchase price of those properties. I offer that as bearing upon a practical interpretation of this offer to purchase by at least one of the parties plaintiff here.

Mr. Wilson: Objected to on the ground it is incompetent, irrelevant, and immaterial, and no foundation laid for it.

The Court: Sustained.

Mr. Mulliner: I offer in that connection also to prove that the inventory in each of those instances was taken as it was taken here, as we contend, after notification of the acceptance from Salt Lake.

Mr. Wilson: The same objection.

The Court: Sustained” [R. 208].

The following authorities show that this ruling constituted reversible error:

From Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 377, subd. 2(a), page 309:

“2(a) Contract evidenced by the other contracts with the same person. Here the making of other

contracts with the same person should be received to show either the making in general or the specific terms of the contract in question, provided the other instances were so connected as to indicate a general plan or habit of which they were merely parts; the widespread use of standard printed forms in mercantile and industrial transactions makes this inference a strong one."

From *Rosenberg v. Moore*, 194 Cal. 392 at page 403:

"The defendant contends that the transaction wherein the first refund was made concerned a contract not involved in this action. Plaintiffs reply that the contract there involved was identical in form with those here involved and the statement is not denied by the defendant. We think the conduct of the parties under such former identical contract, and when their relations were harmonious, was competent evidence of the intention of the parties under the subsequent contracts, and there is much force in the suggestion of plaintiffs that the court should give much weight to that practical construction placed upon the subsequent contracts by the parties themselves. The case of *Mitau v. Roddan*, 149 Cal. 1 (6 L. R. A. (N. S.) 275, 84 Pac. 145), fully supports that contention."

From *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corporation*, 49 F. (2d) 146 at page 151:

"Error is assigned because the trial court admitted orders from the petroleum corporation to the tank company, and invoices therefor, covering other work, about the time of the accident. This was pertinent, persuasive, and material evidence; it proved a uniform course of dealing quite at variance with defendant's claim of no contract."

## POINT VII.

### There Were Two and Possibly Four Separate Acceptances of the Offer to Purchase by the Western Loan and Building Company.

These four acceptances occurred:

- (a) On April 24, 1944 when Carron verbally notified Arthur by telephone of Salt Lake's acceptance [R. 146-148];
- (b) On May 8, 1944 about 1:30 P. M. when Sullivan verbally notified Arthur by telephone that he (Sullivan) had received the closing papers from Salt Lake [R. 157-158];
- (c) Sometime between April 22, 1944 and April 24, 1944 when Sumner's letter [Defendant's Exhibit I, R. 197] to Sullivan approving the sale was deposited in the mail at Salt Lake (a possible acceptance); and
- (d) Sometime between May 5, 1944 and May 8, 1944 when Salt Lake deposited the executed deed, bill of sale, etc., in the mail [R. 156] (a possible acceptance).

#### (a) CARRON'S NOTICE OF ACCEPTANCE OF APRIL 24, 1944.

Carron was the only witness who could be considered disinterested. Arthur and Estes were plaintiffs. Sullivan was in the employ of the Western Loan and Building Company. Carron was employed by the Western Loan and Building Company from February 1, 1942, to May 1, 1944. [R. 118.] At the time of trial and some eight months after these events occurred Carron was employed by the Electrical Products Corporation (not the Alcohol Products Corporation as erroneously transcribed in the record). [R. 118.]



Carron's testimony with reference to his telephone notification on April 24, 1944, was concise, clear and to the point [R. 146-148.] It was made after Sumner's letter of April 22, 1944 [Defendant's Exhibit I, R. 197] had been received in Los Angeles, and was heard by Sullivan. [R. 184-189.] It was corroborated by the telephone bill [Defendant's Exhibit F at R. 173]. Carron's call consisted of notifying Arthur that the offer had been accepted and to arrange for the taking of the inventory.

We have already pointed out under Point VI that the inventory followed acceptance. Carron was on the witness stand on two separate occasions. He was never cross-examined. Why?

The only contradiction of this testimony by Carron comes from Arthur, but this is the self-contradictory and illogical testimony that Salt Lake had to have an inventory before it could accept.

Two written instruments from Western Loan and Building Company refer to Carron's verbal acceptance of April 24, 1944. These are the telegram of May 9, 1944, from Salt Lake to Arthur and Estes [Defendant's Exhibit G, R. 179-180] which reads:

"ANSWER YOUR WIRE YOUR OFFER TO PURCHASE WAS ACCEPTED AND YOU WERE SO NOTIFIED PRIOR TO MAY FIRST. UNDER TERMS OF SAID OFFER CANNOT SEE WHY YOU ARE ENTITLED TO REFUND OF DEPOSIT. PLEASE ADVISE WHY YOU THINK YOU ARE SO ENTITLED." (Underscoring ours.) [R. 180.]

and the letter of May 9, 1944, from Sullivan at Los Angeles to Arthur and Estes [Defendant's Exhibit H, R. 181-182]:

"This will confirm the telephone conversation between J. A. Carron and Albert C. Arthur on April



24, 1944, in which Mr. Carron informed Mr. Arthur of the approval by the Western Loan and Building Company Home Office of the sale of the Norman Manor and Norman Manor Annex Apartments under the terms of your Offer to Purchase.

We have deposited with the Security Title Insurance and Guarantee Co., #480 Court Street, San Bernardino, California, the papers and documents necessary to complete the transfer.

You are respectfully reminded that according to the terms of your Offer to Purchase the closing date is May 15, 1944.” (Underscoring ours.)

Nowhere in the record do we find that Arthur or Estes ever contradicted or questioned these statements. The reason is obvious. Carron’s testimony was true.

(b) SULLIVAN’S ACCEPTANCE OF MAY 8, 1944.

No argument exists as to the fact that Arthur actually received a telephone call from Sullivan that the Western Loan and Building Company had accepted the offer to purchase. [R. 116.] Arthur once fixes the time as May 9, 1944 [R. 116], but there was no telephone call that day; Sullivan places the time as May 8, 1944. [R. 156-157.]

The time is vital to both appellant and appellees.

The record is without conflict that on May 8, 1944, Estes went to attorney Wilson’s office to withdraw the offer. [R. 102.] The letters of revocation [Plaintiffs’ Exhibit 3, R. 55-56] were drafted, signed and mailed from San Bernardino on May 8, 1944 [R. 103] to Western Loan and Building Company in Los Angeles and at Salt Lake, the letter addressed to Los Angeles being re-

ceived May 9, 1944 [R. 106] and the other being received in Salt Lake three days after mailing. [R. 105.] The telegrams of revocation [Plaintiffs' Exhibit 2, R. 53-54] were likewise sent to Los Angeles and Salt Lake. Both telegrams were night letters and the one to Los Angeles was received by the telegraph office in Los Angeles at 10:13 P. M. (after the close of Western's business hours) and it was not telephoned to the Western Loan and Building Company office until 9.21 A. M. the next morning, May 9, 1944. [R. 106.] The night letter to Salt Lake was received by the telegraph office in Salt Lake on May 9, 1944, at 4:13 A. M. and communicated later that day by the telegraph office to the Western Loan and Building Company. [R. 104-105.]

It is obvious, consequently, that no letter or night letter (telegram) of revocation was received by the Western Loan and Building Company in Los Angeles or Salt Lake until 9:21 A. M. on May 9, 1944. Therefore if Sullivan is correct and this notification from him to Arthur took place on May 8, 1944, then there was a good acceptance and the judgment in favor of Arthur and Estes must be reversed.

Sullivan fixed this time as May 8, 1944, at about 1:30 P. M. [R. 156-157.] It was then that Arthur backed out of the sale [R. 156-157.] Sullivan then telephoned Carron in San Diego [R. 176-177], this was about 2:00 P. M. [R. 177.] Still later that day (May 8, 1944) Sullivan telephoned Estes; this was about 5:30 P. M. [R. 183-184.] Sullivan's testimony as to the time was corroborated twice—first by Carron [R. 205-206], and secondly by an unimpeachable source, the telephone bill which shows all of these calls [Defendant's Exhibit F, R. 170-174 at 173] with no telephone calls on May 9, 1944. [R. 172.]

Estes didn't deny this testimony of Sullivan.

This evidence is overwhelming, and there is no evidence which allows the trial court to place this notification on May 9, 1944.

The finding and conclusion, therefore [27], that plaintiffs revoked their offer on May 8, is not supported by the evidence. The offer was delivered to defendant in person. The plaintiffs chose to revoke it by night letter through the agency of the telegraph company, and by the mail through the agency of the post office. They chose these agencies. This notice was therefore not effective or binding upon defendant until it was received, at least by Mr. Sullivan. If the theory of plaintiffs and the Court were correct, that Mr. Sullivan did not have authority even to communicate notice of the acceptance, then this revocation was not effective until received by the Salt Lake office. In any event, the evidence is conclusive that it was not received until May 9 and was not a valid revocation.

13 C. J., p. 295, citing:

*Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479;

*Stitt v. Huidekoper*, 21 L. Ed. 644;

Restatement of Contracts, Par. 41 and Par. 69;

13 C. J., p. 302, sec. 120 (directly in point);

*Wertheimer v. Wehle-Hartford*, 126 Conn. 30,  
9 Atl. (2d) 279, 282.

(c) and (d). There were possibly two other acceptances, one between April 22, 1944, and April 24, 1944, and the other between May 5, 1944 and May 8, 1944. At any rate defendant was working with plaintiffs and going ahead to complete the sale and promptly presented the legally executed documents to close it.

## POINT VIII.

### **The Trial Court Failed and Refused to Make Findings of Fact on the Material Issues.**

It is evident that perhaps the two most material issues in this action (brought on the common count) are:

(a) Did Carron advise Arthur on April 24, 1944, in a telephone conversation that Salt Lake had accepted? and

(b) Did Sullivan advise Arthur on May 8, 1944, in a telephone conversation that Salt Lake had accepted and that he had all the closing papers; and if so was this telephone call before or after the receipt of any telegram or letter of revocation?

The Western Loan and Building Company unsuccessfully attempted to have the trial court make clean cut findings on these issues [R. 28 Notice of Motion by Western Loan and Building Company to Vacate Findings Previously Signed and Amend the Findings]. We also proposed findings on these questions. [R. 33-37.] In fact we sought findings on these issues in every possible way.

We had asked for ten days, after service of proposed findings, to make objections and to discuss these. The Court made an order giving us ten days after service. [R. 271.] However, we were, apparently inadvertently, not given this time or opportunity. Upon service and presentation, the findings were signed and filed. We, thereupon, filed a motion asking for vacation or a modification, and specifically requested findings on these two issues. [R. 29.] They were set forth in our motion "A" and "B." [R. 29.]

(Incidentally, we added "C," requesting a finding as to whether the deposit of \$4337.50 was intended to be applied on the purchase price. This appeared to be material.



It had been recited in plaintiffs' Bill of Particulars that it was, "a deposit to apply on the purchase price." [R. 13.] Yet, the Court made a contrary finding. [R. 26.] This is clearly not supported by the record.)

At the close of the evidence, and after telling the Court we were specially interested in findings on (a) and (b), we offered to get out the transcript of the evidence to assist the Court on this. [R. 271.]

The pleadings were general, and these two issues were the material ones developed at the trial. We were trying, as we still are, to have the courts determine whether our method of selling through our sales manager and on this offer is a legal method.

It appeared to be assumed that we had, in view of plaintiffs' admissions, established that Carron did verbally notify plaintiffs of the acceptance, April 24. At the conclusion, the Court asked counsel, in argument, to discuss the matter, "assuming that Mr. Carron's testimony is true, that he 'phoned Mr. Estes or Mr. Arthur on April—whatever date it was." [R. 248.] When the findings were drawn and signed, they simply recited:

"(i) That the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer;" [R. 26.]

This is so general as to settle nothing factual so that the law could be applied as to whether the verbal notice by this agent was notice. The Court had indicated it might not be, because it was verbal, and because it did not come from some official, or because this agent might not have authority to communicate it. It will be seen from the Court's statements above quoted, and from the record, that this might also be based upon some theory



of lack of a, preceding, approval by a committee, or the directors, or something of this kind.

What is legal "notice" or what is legal "acceptance" are law questions. His finding, therefore, is in the nature of a legal conclusion.

We could not bring the Court to make a finding on (a) or (b) of the simple underlying facts as to whether the calls were actually made. Such, would have settled these issues and made a simple case out of this.

Now, we cannot tell whether the Court found these facts against us so as to raise the issue of support therefor in the evidence, or, whether he found against us on some theory of law. And, if the latter, upon what theory. The Court discussed at least half a dozen theories [R. 248-271], none of which it is possible to now put our finger on. And they cannot all be briefed here. This situation raises three principles which we invoke:

(1) A trial court cannot, by evasion of a simple, direct, material issue, and by raising numerous possible theories, then, by a general finding, deprive a litigant of any possible review on appeal of the theory relied upon to support such finding.

(2) A trial court cannot avoid a review of its disposition of a material claim by casting it in the form of unreviewable findings of fact.

(3) Under the general claim, as here pleaded, defendant was entitled to findings of fact on these two material issues of fact, **joined at the trial.**

Number (1) above would appear to be quite elementary.

*Norris v. Alabama*, 294 U. S. 587, 590, support, in principle, number (2).

The following authorities support the foregoing contentions :

*Rule 52 says:*

“In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon \* \* \* requests for findings are not necessary for purposes of review.”

See *U. S. v. Forness*, 125 F. (2d) 928, 942-43, for a good discussion and notes, including comment, by Justice Hughes on these matters, also:

*U. S. v. Jefferson Elec. Co.*, 291 U. S. 386, 77 L. Ed. 959, 973-75;

*Himmell Bros. Co. v. Serrick* (7 C. C.), 122 F. (2d) 740. (Also, 119 F. (2d) 704 (3 C. C. and 124 F. (2d) 589.)

In *Hubshman v. Louis Kerr Shoe Co.*, 129 F. (2d) 137, 142, the court said:

“Findings of fact are like a special verdict, and all the facts essential to entitle a party to judgment must be found; and a judgment rendered on a special finding that fails to find all the essential facts is erroneous. *Ward v. Cochran*, 150 U. S. 597, 608, 14 S. Ct. 230, 37 L. Ed. 1195; *United States Fidelity & Guaranty Co. v. Commercial Nat. Bank*, 5 Cir., 55 F. 2d 564, 567; *United States v. Harris*, 7 Cir., 77 F. 821; *Daube v. Philadelphia, etc., Co.*, 7 Cir., 77 F. 713.”

*Bridgeport Airport, Inc. v. Title Guaranty & Tr. Co.*, 111 Conn. 537, 150 Atl. 509, 71 A. L. R. 345, 348.

## POINT IX.

### Other Reversible Errors.

Some other errors which are relied upon, and to which we now call attention, are:

The trial court rejected all offers of evidence to show a basis of liquidated damages, or our right under the Offer to hold the deposit as such [R. 135-145]. We were sued on the common count for money had and received for plaintiffs' use. The case was tried under the liberalized rules of civil procedure. It was not as if we were suing for damages—we were merely asserting our right to hold the money. The offer of purchase was in evidence. We had established our readiness and willingness to perform the contract. We had gone into escrow. If plaintiffs had been attempting to hold us to the contract, they clearly could have done so. Any legal reason we had for holding the deposit was admissible.

*Granite Trust Co. v. Grt. A. & P. T. Co.*, 36 Fed. Supp. 77, 78.

We were entitled to show all the numerous operations and different people employed in order to complete this sale and the fluctuations, in the interval, in property prices as influenced by the changes in the war situation. It was proper and necessary to do this in order to show a basis for the liquidated damages provision relating to this deposit.

As to this deposit, see:

19 C. J., p. 853;

*Howe v. Smith*, 27 Law Reports, Ch. D. 89 (a leading case);

*Grimsley v. Life Ins. Co. of Va.*, 154 S. W. (2d) 196 (in point here);

*Glock v. Howard & Wilson Co.*, 123 Cal. 1, 55 Pac. 713 (a leading Cal. case).

Another error, somewhat related to the foregoing, is the finding [R. 26] that it was "untrue" that we were willing and able to perform in accordance with this Offer. This finding is so palpably erroneous, and contrary to all the documentary and other evidence, that discussion is unnecessary.

There was also error, we believe, in the exclusion of the offered testimony of Mr. Sullivan as to what Mr. Carron said to Mr. Arthur when he had him on the telephone on April 24. Whether this constituted notice of the acceptance, was the crux of one main issue. It might have been rejected, without prejudice, as being cumulative, if the Court intended to, and had found, Carron's statement of this conversation to be true. While the Court indicated that it was, we cannot tell that he did so conclude. He did not directly so find. This would appear to constitute an exclusion of material evidence.

It also emphasizes, again, the importance of a finding of fact as to this conversation.

We rely, also, upon the error of the trial court in excluding the testimony of Mr. Estes, one of the plaintiffs and a real estate broker, and, also, the offered testimony of Mr. Sullivan to the effect that Mr. Estes had handled, as broker and purchaser, other similar apartment house transactions with the defendant. That he knew inventories were not taken until after sales were agreed to and that notice of acceptance was communicated in the manner herein involved.

### Conclusion.

Since the agreement contained in the Offer to Purchase became effective upon acceptance, and notice thereof given by the agents of defendants and in the manner intended by the parties thereto, and since no withdrawal of the Offer was communicated to defendant before such acceptance, the law appears clear that plaintiffs cannot, upon their own failure and default of performance, recover this deposit.

That any authority to accept cannot be questioned, when all closing documents, authoritatively executed, were delivered in escrow and full performance tendered by defendant, prior to May 15, and within the time agreed to for the closing of the sale.

That after the notice of April 24, plaintiffs joined in taking, and endorsed their approval on the inventory and encouraged and authorized the further proceedings to close the transaction, knowing it would require time beyond May 1, and thus consenting to the further procedure necessary to be taken before May 15. They knew defendant was proceeding with, and did complete, these further steps. They, therefore, waived any technical objections to the sufficiency of notice, if any there were.

If, it is contended, the notices of acceptance of April 24 and May 8 were not given as testified by plaintiffs' witness, defendant is clearly entitled to findings of fact and a clear-cut decision on these underlying material issues. And since the trial court asked for argument



on the assumption that the notice of April 24 was given as testified, and then proposed a number of other theories, and presumptively based decision on one or more of these, it is impossible to determine the factual or legal basis of the findings or judgment. Defendant is thus deprived of its fundamental right of review herein.

For these reasons, and because of the other errors assigned and discussed, it seems to us, that appellant is entitled to a reversal of the judgment herein.

Respectfully submitted,

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H. L. MULLINER,

By M. PERELLI-MINETTI,

*Attorneys for Appellant.*



No. 11075

IN THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

WESTERN LOAN AND BUILDING COMPANY,  
a corporation,  
*Appellant,*

vs.

ALBERT C. ARTHUR AND H. B. ESTES,  
*Appellees.*

---

APPELLEES' REPLY BRIEF

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APPELLEES' REPLY BRIEF

---

STATEMENT OF FACTS

Appellees instituted this action to recover the sum of \$4,337.50 deposited with Appellant pursuant to the provisions of a written offer to purchase an apartment house and its furnishings.

Pursuant to its findings, the Trial Court rendered judgment in favor of Appellees.

Its motion for a new trial having been denied, Appellant has appealed from the judgment and order.

The essential facts, in chronological order, are:

April 1st, 1944, Appellees executed the offer (Exhs. 1 and 6; R. 51 and 69);

NOTE: Transcript references of a single figure denote pages; of two figures ,separated by a hyphen, denote page and line respectively. Italicized portions of quotations are not italicized in the originals, unless expressly noted.

April 25th, 1944, an inventory of the furnishings was taken (R. 149 and 150);

May 8th, 1944, two telegrams and two letters were sent by Appellees revoking the offer (R. 53 to 56);

May 9th, 1944, 4:13 A. M., one telegram was received at Salt Lake City, and later that morning delivered to the Salt Lake office of Appellant ( R. 104 and 105);

May 9th, 1944, 9:21 A. M., the other telegram was transmitted by telephone to the Los Angeles office of Appellant (R. 106);

May 9th, 1944, 1:40 P. M., a telegram was sent by Appellant from its Salt Lake office in answer to the telegram of Appellees (Exh. G; R. 179 and 180);

May 9th, 1944, 4 P. M., Appellant placed its conveyances and other documents in escrow with the title company (R. 200);

May 10th, 1944, Appellees received a letter that the conveyances and other documents had been placed in escrow (Exh. H; R. 182).

Errors in the Statement of Facts of Appellant, either at variance with the foregoing essential facts, or at variance with other material facts, will be noted in the ensuing argument.

## I.

**THE INSTRUMENT CONSTITUTED AN OFFER;**

**THE DEPOSIT CONSTITUTED FORFEIT MONEY**

In the Opening Brief (p. 1), Appellant states that

this action is brought to recover a “*deposit* delivered by said plaintiffs to said defendant on an *agreement* to purchase an apartment house”.

In its Amended Answer (R. 20), Appellant admits that “plaintiffs demanded the sum of \$4,337.50”, and alleges that such demand was made in connection “with the request by plaintiffs of the return to them of said sum previously paid by them and accepted by defendant as a deposit and *part payment* on the purchase price . . . . .”.

(1) *The instrument constituted an offer, not an agreement.*

The instrument (Exh. 6; R. 69) is designated “Offer to Purchase”. It recites (R. 70) that “this offer shall remain open and irrevocable to and including May 1st, 1944”.

This “offer” could not become the basis for an *agreement* until accepted.

(2) *The deposit constituted forfeit money, not part payment on the purchase price.*

The instrument recites (R. 70):

“To cover such, a deposit, as stated below is agreed upon and settled as to the amount required reasonably to indemnify Owner and as liquidated damage to be retained by it if after acceptance hereof this sale is not completed by reason of any fault or failure of mine, or if this offer is withdrawn prior to May 1st, 1944.”

The *deposit* was delivered to defendant “to indemnify Owner and as liquidated damage to be retained by it” *only*:

- (a) If, *after* acceptance, the sale is not completed;
- (b) If the offer is *withdrawn* prior to May 1st.

The deposit was not delivered as part payment on the purchase price. It could not be, since the purchase price had not been agreed upon. Title did not pass. There was no intention that title should pass. The defendant held the deposit as a stakeholder merely, subject to disposition upon the happening of one of the two contingencies specified. Before title could pass, Appellant was required to establish that the offer had been "accepted" (an act to be performed by defendant), or that the offer had been "withdrawn" prior to May 1st (an act to be performed by plaintiffs).

(3) *Appellees were not in the position of vendees.*

Since the instrument was a mere offer, not an agreement, the relation of vendor and vendee was never created. That relation cannot arise until one (the vendee) has agreed to purchase and the other (the vendor) has agreed to sell. The cases of *Laffey v. Kaufman*, 134 Cal. 391 (66 Pac. 494) and *Walbridge v. Richards*, 212 Cal. 408 (298 Pac. 985), cited by Appellant (Op. Br. pp. 14 and 15) apply the general rule that a vendee who has paid all or a part of the purchase price may not, in the event the vendor is able and willing to perform, recover the money so paid. In such cases the title to the money has passed to the vendor. Such is the necessary result of the *agreement*, whether oral or written. This rule does not apply, however, where the title to the money has not passed. Where, as here, the money is delivered to a stakeholder, title does not pass until the happening of the contingency agreed upon.



## II.

THE EVIDENCE SUSTAINS THE FINDING THAT  
THE OFFER WAS NOT ACCEPTED

The complaint alleges a cause of action for money had and received (R. 2).

The amended answer pleaded affirmatively that "on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase" (R. 21).

The Court found that the offer was revoked on May 8th, that Appellant on May 9th received notice of such revocation, and that (R. 26) :

"the defendant did not, prior to receiving notice and obtaining knowledge of plaintiffs' withdrawal and revocation, accept said offer".

The Court also found (R. 26) :

"(1) That it is not true that on or about April 28th, 1944, or at any other time while said offer remained open, the defendant verbally or otherwise accepted said offer, or agreed to sell or did sell to plaintiffs the said Apartments, or any property whatsoever."

Appellant fails to indicate wherein the evidence is insufficient to sustain these findings. The findings are necessarily in the negative, viz., that the defendant did not accept the offer. Appellant fails to point out wherein the evidence establishes the affirmative, viz., that it did accept it. Yet the burden was upon Appellant to establish the affirmative by a preponderance of the evidence.

(a) *Acceptance by a corporation can only be made by an agent or officer having authority so to do.*

The rule is thus stated (6a Cal. Jur. Sec. 653) :

“To prove a contract claimed to be binding on a corporation, it should be shown that the agreement was made on the corporation’s behalf by someone who had authority to act for it.”

In Mariposa Commercial etc. Co. v. Peters, 215 Cal. 134, (8 Pac. 2d 849) the corporation executed a lease of real property with an option to purchase. The lessee attempted to establish a modification by letters and telegrams between himself and the president of the corporation. The Court said (140) :

“For still another reason we are of the opinion that the modifying agreement was not binding on respondent. The lease and option were in the name of and executed by the respondent under its corporate seal. The modifying agreement was entered into by Benjamin, who was president of respondent corporation. As far as the record is concerned Benjamin was *without authority* to thus modify the contract of the corporation in reference to real property. The *burden* was upon Fremont Grant, Inc., to prove the allegations of the cross-complaint in reference to this modifying agreement, and to *prove*, if it desired the affirmative relief of specific performance, the *authority* of Benjamin to thus bind respondent corporation. Having failed to do so the modifying agreement cannot be held to be binding on the corporation. (Black v. Harrison Home Co., 155 Cal. 121 (99) Pac. 494) ; 6a Cal. Jur. 1146, sec. 653; 6a Cal. Jur.

1138, sec. 648; 6a Cal. Jur. 1153, sec. 644.) It therefore follows that the findings to the effect that no modifying agreement binding on the respondent had been entered into, and denying specific performance of such agreement, are amply supported by the evidence.”

In *Black v. Harrison Home Company*, 155 Cal. 121 (99 Pac. 494) an action was brought by the vendee to enforce a contract in writing for the sale of real property executed in the name of the corporation by its president. The Court said (126):

“It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, section 716, as follows: ‘The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds or management. This is a rule which prevails everywhere, excepting possibly in the state of Illinois . . . It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power

in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director.' (See *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 632, (21 Pac. 373); *Bliss v. Kaweah etc. Co.*, 65 Cal. 502, (4 Pac. 507); *Salfield v. Sutter etc. Co.*, 94 Cal. 546, (29 Pac. 1105); *Blood v. La Serena etc. Co.*, 113 Cal. 221, (41 Pac. 1017, 45 Pac. 252); *Barney v. Pfoor*, 117 Cal. 56, 58, (48 Pac. 987); *Northwestern etc. Co. v. Whitney*, 5 Cal. App. 105, 108, (89 Pac. 981).)"

In *Daum v. Weber Showcase etc. Co.*, 103 Cal. App. 74, (283 Pac. 957) an action was brought upon a broker's contract in writing for the sale of real property executed in the name of the corporation. The judgment in favor of the corporation was affirmed, the Court saying (76):

"At the time of the execution of said agreement there was no written agreement, memorandum or minutes of the corporation *authorizing* Fred Weber to execute said agreement or to sign the name of the corporation, Weber Showcase & Fixture Company, thereto (sec. 2309, Civ. Code), and a corporation can confer authority upon an agent for that purpose only through its board of directors acting as such by resolution duly passed and recorded, and a ratification of such an act by an agent can be made only in like manner. (*Salfield v. Sutter etc. Land Co.*, 94 Cal. 546 (29 Pac. 1105).)



“It appearing that the power and authority to be conferred by the agreement falls within the inhibitions of section 1624 of the Civil Code, and section 2309 of the Civil Code, plaintiff cannot maintain his position, and the judgment is affirmed.”

In *Scott v. Los Angeles Mountain Park Company*, 92 Cal. App. 258, (267 Pac. 914) an action was brought by the vendee to recover damages for breach of a contract in writing for the sale of real property executed in the name of the corporation by one of its directors. The judgment of nonsuit was affirmed upon the ground that the authority of the director was not established.

In *Peasley v. Producers Market Co., Inc.*, 86 Cal. App. 577, (261 Pac. 733) an action was brought on a written lease executed in the name of the corporation by its president. Judgment in favor of the corporation was affirmed, the Court holding that the authority of the president was not established.

(b) *Appellant failed to establish authority in any agent or officer.*

No evidence was offered which identified the agent or officer vested with authority to accept the offer. The offer does not identify such agent or officer. It merely recites (R. 70):

“that upon receipt of this offer and pending approval and closing that other sales may be lost to the Owner, Western Loan and Building Company, that the Owner will at once commence investigation hereon and cause appraisals to be made and an examination by its Executive Committee to be had . . . .”.



The prospectus (Exh. 5, R. 63) does state (R. 64) :

“All offers are subject to approval by the Executive Committee of Western Loan and Building Company.”

But it does not state that the “approval” by this Committee constitutes an acceptance. Such an approval may be merely a prerequisite to acceptance — merely one step in the corporate procedure prescribed in perfecting an acceptance.

Neither Carron nor Sullivan, the only two witnesses produced by Appellant, had authority to accept. So much was conceded. Carron testified that he did not have “authority to accept the deal” (R. 127).

Sullivan testified that C. J. Sumner was his (R. 185) “final executive authority on all sales”, from whom he received “authority . . . to proceed with the closing of the sale” (R. 201).

Arthur testified (R. 231) that Carron and Sullivan stated that “neither of them had the power to make any kind of a deal” . . . “They themselves could not give us any kind of an answer”.

There is no conflict in the record. The acceptance could only be made in the Salt Lake office. But by whom? The record does not reveal his or their identity.

(c) *Appellant failed to establish acceptance by an officer or agent so authorized.*

Acceptance is a legal act. It must be performed by one having contractual capacity—the power to contract. It embraces two elements, viz:

(1) The consent, and

(2) The communication of that consent.

Section 1565 of the Civil Code of California provides:

“Essentials of consent. The consent of the parties to a contract must be:

1. Free;
2. Mutual; and,
3. Communicated by each to the other.”

Sections 1581 and 1582 of said Code provide:

“Communication of consent. Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication.”

“Mode of communicating acceptance of proposal. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.”

The offer in question does not prescribe any “conditions concerning the communication of its acceptance”. Therefore, appellant would have been well within its rights had it adopted “any reasonable and usual mode” for the communication of its acceptance. But there is no evidence that anyone, having the authority so to do, effected the “consent” of appellant — made the decision on its behalf. Nor is there any evidence that any officer or agent, so authorized, “communicated” to Appellees its consent in any “reasonable and usual mode”.

If the Executive Committee charged as it was with

duty of "approval" was also authorized to "consent" to the offer — to accept it, there is no evidence that it did so. Neither is there any evidence that this "Committee" ever communicated such acceptance to Appellees.

If Sumner was authorized to consent, and to communicate such consent, there is no evidence that he did either.

The only evidence relied upon to establish consent, and communication of it, consists of a purported telephone conversation on April 24th, 1944, between Carron and Arthur, and a purported conversation on May 8th or 9th between Sullivan and Arthur.

(d) *The purported telephone conversation of April 24th, 1944, was not an acceptance.*

Appellant pleaded (R. 21):

"that on or about April 24, 1944 and while said offer remained open defendant verbally accepted said offer to purchase . . . .".

As already noted, the Court found this allegation to be untrue (R. 26).

Carron testified, over objections of Appellees, that on April 24th he called Arthur by telephone, at which time the following conversation took place (R. 147):

"A. When he answered the 'phone I said, "Hello. Art?"

He said, 'Yes.'

And then I said, 'Congratulations.'

And he said, 'For what?'

And I said, 'Because you are the new owner of the Norman Manor and Annex Apartments on E Street.'

Then his next remark was, 'So they accepted the deal, Herb?'

And I said, 'Yes, they have accepted the deal.'

Then he said, 'What do we do now?'

I said, 'Well, the next step is for me to go and take an inventory of the company-owned property.'

And he said, 'When will you be out?'

I said, 'Oh, in the next day or so; perhaps tomorrow.'

(100) Then I asked him if he would make a reservation for me at the California Hotel, that I would be out the next day, April 25th, and I arranged to meet him, as I recall, at his jewelry store at about noon."

Arthur denied the conversation, insofar as it related to the statement that "they have accepted the deal." He testified (R. 115):

"The Court: Did you ever receive any written communication from the Western Loan & Building or Mr. Carron or Mr. Sullivan on or before May 1, 1944, that they had accepted or rejected the offer contained in Exhibit 1 and Exhibit 6?

The Witness: No, sir.

Mr. Mulliner: Your Honor—

The Court: Well, I will strike it if you wish.

Mr. Mulliner: Of course, it is our position, if your Honor will permit me, that this does not depend on a written communication of acceptance.

The Court: I just asked if he had received one. You can develop any other kind of communication. I was going to ask him the same question I asked of Mr. Estes.

Did you receive any oral communication from Mr. Carron or Mr. Sullivan or any other person representing or claiming that they represented the Western Building and Loan on or before May 1, 1944, advising you that your offer was accepted?  
The Witness: No, sir.

Mr. Wilson: That is the Western Loan & Building Company, your Honor.

The Court: Whatever it is. You knew who I meant, didn't you.

The Witness: Yes, sir. (62)

The Court: All right."

Arthur also testified (R. 227) :

" 'A Oh, the day of the telephone conversation we just talked about the preparation for the inventory.'

You so testified, did you not? A Yes, sir.

Q (Reading) :

'Q And on that occasion Mr. Carron did not state to you that Salt Lake had accepted the offer?

"A I asked him if Salt Lake had accepted the offer and he said we would have to take an inventory first and send it to Salt Lake.' "

Estes testified that up to May 1st, 1944, he had not been advised by anyone that the "deal had been accepted." He testified (R. 92) :

"The Court: Did you ever receive any communication in writing from the Western Building & Loan or Mr. Sullivan or Mr. Varron before May 1, 1944, that the Western Building & Loan had accepted your offer?

A. Before May 1st? What date does that offer of



purchase have?

The Court: This Exhibit 6 and Exhibit 1 are—the testimony has been that they were written may 1st—

Mr. Wilson: April 1st.

The Court: April 1, 1944.

The Witness: No, sir, I never received anything in writing from them that the deal had been accepted.

The Court: At any time?

The Witness: No, sir.

The Court: Did you ever receive any other information that the deal had been accepted on or before May 1, 1944, from either one of the two gentlemen mentioned or anyone else representing or pretending to represent the Western Building & Loan?

The Witness: No, sir.

The Court: You did not? (33)

The Witness: No, sir.

The Court: All right."

Since the evidence is conflicting, the finding is conclusive. "Findings of Fact shall not be set aside unless clearly erroneous" (Rule 52 (a)).

So far as a finding "depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable" (*Wittmayer v. U. S., C. C. A. 9th, 118 Fed. 2d. 808-811*).

But even if there had been no conflict in the evidence, Carron's version of the conversation of April 24th was not an acceptance. The acceptance, and communication thereof, must come from one having authority.

There is no evidence that Carron had authority either to "consent" on behalf of the corporation, or to "communicate" consent on its behalf.

(e) *The purported conversation of May 8th or May 9th was not an acceptance.*

As already noted, the only acceptance pleaded was a verbal acceptance "on or about April 24th, 1944".

In the telegram of May 9th from the Salt Lake office (Exh. G, R. 180), the only acceptance referred to was one "prior to May 1st". Yet Appellant now asserts (Op. Br. 43) that the offer was accepted on May 8th, 1944. This refers to a purported telephone conversation between Sullivan and Arthur. Sullivan's version was as follows (R. 157):

"A. I said, Hello, Mr. Arthur.'

And he said 'Yes.'

I said, 'This is Mr. Sullivan at Western Loan & Building Company.'

He said, 'Yes.'

I said, 'I have the papers here and am ready to close the sale.'

He then replied, 'We are not going through with the sale. Didn't you know?'

However, on cross-examination he testified (R. 200):

"Q. By Mr. Wilson: You stated yesterday, I believe, that at some time on May 8th or May 9th, 1944, you got hold of Mr. Arthur on the telephone?

A. That is correct, May 8th.

Q. May 8th? And at that time Mr. Arthur said to you, didn't you know that he was not going through with the deal? A. Yes, he did.

Q. Didn't he tell you that a telegram had been

sent to you so informing you? A. Yes."

But the "telegram" referred to on this cross-examination was a night letter sent May 8th (Exh. 2, R. 53).

Arthur, however, fixed the date as May 9th. He testified (R. 116):

"Q. By Mr. Mulliner: Did you receive any oral communication that Western Loan & Building Company had accepted the proposition?

The Court: You mean at any time?

Mr. Mulliner: Yes.

A. I received a telephone call from Mr. Sullivan stating that—

The Court: When?

The Witness: On May 9th.

Q. By Mr. Mulliner: Was that the only communication that you received?

A. That is the only one relative to any acceptance of the deal.

Q. And you say that was after May 1st, and, in fact, May 9th- A. Yes, sir."

The version of Estes was as follows (R. 100):

"A. Yes, but that information, I think, came after we had wired them—after Mr. Wilson had wired them that we rejected the deal."

The Court found, as above noted, that it was not true that on about April 28th, "or at any other time . . . the defendant verbally or otherwise accepted said offer".

Here, again, since the evidence is in conflict, the finding, under the authorities above noted, is conclusive.

Furthermore, even if there were no conflict, Sullivan's version of the conversation was not an acceptance. There is no evidence that Sullivan had authority either to "consent" on behalf of the corporation, or to "communicate" consent on its behalf. Sullivan did not purport to transmit the decision of any officer or agent so authorized.

Acceptance cannot rest upon speculation or conjecture. The offerer is entitled to know, from an authoritative source, that the corporation has accepted the offer. Furthermore, this information must be transmitted by a "reasonable and usual mode". In this instance, since the authoritative source apparently was located in Salt Lake City, a "reasonable and usual mode" would have required a written communication (letter or telegram) from the officer or agent authorized by the corporation to consent on its behalf, and to communicate such consent. Certainly, telephone conversations by persons not so authorized do not constitute a "reasonable and usual mode".

(f) *The revocation extinguished the offer.*

The telegrams and letters of revocation were sent May 8th, and received both in the Los Angeles office and in the Salt Lake office on the morning of May 9th. Not until 4 P. M. on the 9th were escrow instructions and other documents executed by the corporation delivered to the title company, of which plaintiffs received written notice on May 10th. But as an acceptance and communication of "consent" these acts were too late. Acceptance after revocation is, of course, ineffectual.

Sec. 1586 of the California Civil Code provides:



“A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.”

“It is elementary that an offer may be revoked at any time before acceptance, and this rule applies in cases where the offer states, as it does here, that it shall remain open for a designated period” (*Grieve v. Mullaly*, 211 Cal. 77, 79; 293 Pac. 619).

### III.

#### THE COURT FOUND ON ALL MATERIAL ISSUES

As Point VIII (Op. Br. p. 46), Appellant contends that the Court should have found specifically upon two asserted “material issues”, to-wit:

(a) Did Carron advise Arthur on April 24th, 1944, in a telephone conversation that Salt Lake had accepted?

(b) Did Sullivan advise Arthur on May 8th, 1944, in a telephone conversation that Salt Lake had accepted, and that he had all the closing papers; if so, was this telephone call before or after the receipt of any telegram or letter of revocation?

These inquiries relate to probative facts. The ultimate facts, viz., that the offer had not been accepted “verbally or otherwise” prior to revocation necessarily include a finding with respect to these probative facts. Where findings of ultimate facts carry by implication a determination of probative facts, specific findings with respect to probative facts are not required. (*Brown Paper Mill Co. Inc. vs. Irwin*, C. C. A. 8th, 134 Fed. 2d. 337; *Gay Games Inc. vs. Smith*, C. C. A.



7th, 132 Fed. 2d. 930; Klimiewicz vs. Westminster Deposit and Trust Company, C. C. A. D. C., 122 Fed. 2d. 957-8; McGee v. Nee, C. C. A. 8th, 113 Fed. 2d. 543.)

In McGee v. Nee, *supra*, the Court said:

“A trial court in making findings of fact is required to find only the ultimate facts”.

Incidentally, the statement (Op. Br. p. 47) “that it had been recited in plaintiffs’ Bill of Particulars that it was, ‘a deposit to apply on the purchase price’ ” is not correct. The recital therein referred to (R. 13) is as follows:

“said sum was so delivered by plaintiffs to defendant and was received by defendant, as aforesaid, as a deposit to apply on the purchase price of certain real (15) property *in the event a contract for the purchase thereof was entered into* between the plaintiffs and the said defendant.”

The written offer does not so provide. The parties orally agreed, however, that if the property was purchased the deposit, instead of being returned, should be retained to apply on the down payment.

#### IV.

#### THE VALIDITY OF THE PROVISION FOR LIQUIDATED DAMAGES IS NOT AN ISSUE

As Point II (Op. Br. 17) Appellant contends that the provision for liquidated damages is valid.

But Appellant sought to retain the deposit upon the theory that the offer had been accepted. Obviously, if there was no acceptance, as the Trial Court found,

it could not be retained under any circumstances.

Furthermore, even if there had been an acceptance, Appellant, in order to retain the deposit as liquidated damages, was required to plead and prove facts "from which the court can say as a matter of law that the contract for liquidated damages is valid because from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose" (*Robert Marsh & Co., Inc., v. Tremper*, 210 Cal. 572, 576; 292 Pac. 950).

Such facts were not pleaded.

## V.

### WAIVER OF TIME LIMIT IS NOT AN ISSUE

As Point V (Op. Br. 28), Appellant contends that the time limit, to-wit: May 1st, was waived. Since the Court found that the offer was not accepted prior to revocation, the point is not an issue. Furthermore, if waiver was relied upon, it should have been pleaded (*Wienke v. Smith*, 179 Cal. 220, 225; 176 Pac. 42).

## VI.

### OTHER POINTS NOT IN ISSUE

In view of the finding that the offer was not accepted "verbally or otherwise" prior to revocation, it is obviously unnecessary to determine the other points raised in Appellant's Opening Brief, including:

Point I: Whether a verbal acceptance is sufficient.

Point III: Whether the offer was definite and certain;

Point IV: Whether the offer was to remain open until May 15th;

Point VI: Whether the inventory had any connection with Salt Lake's offer.

### IN CONCLUSION

Inasmuch as the chief point raised upon appeal relates to acceptance, and the Court found that the offer was not accepted, "verbally or otherwise", prior to revocation, the judgment, it is submitted, under the authorities above noted, should be affirmed.

Respectfully submitted,

FRED. A. WILSON,  
*Attorney for Appellees.*

No. 11080

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOHN E. GALLOIS, Executor and JEANNE G.  
HILL, Executrix of the Estate of MAR-  
GARET P. GALLOIS, Deceased,  
Petitioners,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

FILED

1945

PAUL H. GIBBEN,  
CLERK





No. 11080

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United States  
Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

CLYDE C. SHERWOOD, Esq.

JOHN V. LEWIS, Esq.

JEROME POLITZER, Esq.

For Comm'r.:

T. M. MATHER, Esq.

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Docket No. 3507

ESTATE OF MARGARET P. GALLOIS,  
Deceased, JOHN E. GALLOIS, Executor, and  
JEANNE G. HILL, Executrix,  
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1943

Nov. 26—Petition received and filed. Taxpayer notified. Fee paid.

” 26—Copy of petition served on General Counsel.

Dec. 28—Answer filed by General Counsel.

“ 28—Request for Circuit hearing in San Francisco filed by General Counsel.

“ 30—Notice issued placing proceeding on San San Francisco calendar. Service of answer and request made.



1944

Aug. 10—Hearing set September 18, 1944 at San Francisco, California.

Sep. 22—Hearing had before Judge Van Fossan on merits. Submitted. Petitioner's brief due Oct. 22, 1944—respondent's reply Nov. 22, 1944—Petitioner's reply Dec. 22, 1944.

Oct. 14—Transcript of hearing of 9/22/44 filed.

“ 18—Brief filed by taxpayer. 10/19/44 copy served.

Nov. 11—Reply brief filed by General Counsel.

Dec. 20—Reply brief filed by taxpayer. 12/20/44 copy served.

1945

Feb. 27—Findings of fact and opinion rendered, Van Fossan, J. Decision will be entered for the respondent. Copies served.

“ 27—Decision entered, Van Fossan J. Div. 9.

May 24—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

“ 24—Proof of service filed.

“ 24—Designation of portions of the record, proceeding and evidence to be contained in the record filed by taxpayer with proof of service thereon. [\*1]

Tax Court of the United States

Docket No. 3507

ESTATE OF MARGARET P. GALLOIS,  
Deceased, JOHN E. GALLOIS, Executor, and  
JEANNE G. HILL, Executrix,  
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco IRA:ET:90-D-CSW (C:TS:PD, SF:HMS) dated Aug. 31, 1943, and as a basis for their proceeding, allege as follows:

1. Petitioner John E. Gallois is the Executor and Jeanne G. Hill is the Executrix of the estate of Margaret P. Gallois, Deceased, with central office at 1143 Taylor Street, San Francisco, California. The return for the period here involved was filed with the Collector of the First District of California. The date of death of Margaret P. Gallois was August 8th, 1940. [2]

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to the petitioners on August 31, 1943.

3. The taxes in controversy are estate taxes due for the year 1941. The amount in dispute is the proposed deficiency of \$19,323.36.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

I.

The respondent erroneously held that the value of the property of a certain trust created by an instrument dated August 9th, 1924 is includible in the gross estate under the provision of Section 811(c) of the Internal Revenue Code.

II.

The respondent erroneously held that 1193 shares of Raphael Weill & Co. common stock had a market value of \$119,300.00, when in truth and in fact the value of the 1193 shares of Raphael Weill & Co. stock was \$95,440.00.

III.

The respondent erroneously held that the real estate located at 326-334 Sutter Street, San Francisco, California, had a value of \$75,000.00, when in truth and in fact the value of said real estate was only \$55,000.00.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

I.

Margaret P. Gallois died on the 8th day of August, 1940; said decedent at the time of her death was a resident of the City and [3] County of San Francisco, State of California, and her last will was admitted to probate by an order of the Superior Court of the State of California, in and for the City

and County of San Francisco, duly given and made on the 12th day of November, 1940, and John E. Gallois was appointed Executor of the Estate of said Margaret P. Gallois, and Jeanne G. Hill was appointed Executrix thereof, and letters testamentary were issued to them on the 12th day of November, 1940, which are still in full force and effect.

## II.

Within the time required by law, the petitioners, John E. Gallois as Executor and Jeanne G. Hill as Executrix, filed an estate-tax return for the Estate of said Margaret P. Gallois, Deceased, with the Collector of Internal Revenue, First District of California, at San Francisco, California.

## III.

The petitioners allege that during the years from 1919 to 1922, inclusive, John E. Gallois borrowed a total of \$251,000.00 from decedent, Margaret P. Gallois. On August 9th, 1924, said Margaret P. Gallois created a trust, which is attached hereto as "Exhibit B," to petitioners' Petition and incorporated herein as if here set forth in haec verba. Said trust agreement specifically provided that said Margaret P. Gallois, Emile M. Pissis, and William H. Cook should be the trustees.

## IV.

On or about December 1st, 1927, the statute of limitations having run on the obligation of said John E. Gallois in the amount of \$251,000.00 to said Margaret P. Gallois, an agreement was reached be-

tween said John E. Gallois and said Margaret P. Gallois that if [4] said John E. Gallois would execute a promissory note to the trustees of said Margaret P. Gallois in the amount of \$251,000.00, thus reviving the obligation barred by the California Statute of Limitations, and if said John E. Gallois paid said note, he would then be entitled to one half of the property contained in said trust estate created by said Margaret P. Gallois on August 9, 1924, which said trust estate is the trust estate created by the agreement set forth in petitioners' Exhibit B. Said Margaret P. Gallois agreed in consideration of the execution of said note and the future payment thereof, that said Margaret P. Gallois would not withdraw any funds from the trust created by said trust agreement in excess of the income from said trust. It was further understood and agreed between said John E. Gallois and said Margaret P. Gallois that upon the making of substantial payments on account of said note by said John E. Gallois, said John E. Gallois would be made a trustee of said trust in order to protect his interest in the trust property and to prevent any invasion of the trust corpus by the said Margaret P. Gallois. As a further safeguard in the event that said John E. Gallois did not pay the note executed on December 1st, 1927, said John E. Gallois was to execute a resignation as trustee of said trust effective ninety days after the death of said Margaret P. Gallois.



## V.

Pursuant to said agreement between said Margaret P. Gallois and said John E. Gallois, said John E. Gallois was duly appointed trustee by the Superior Court of the State of California, in and for the City and County of San Francisco, of the trust estate referred to in petitioners' Exhibit B. On November 7th, 1928, John E. Gallois [5] executed and delivered his said resignation as trustee to take effect ninety days after the death of said Margaret P. Gallois, in accordance with their mutual agreement of December 1st, 1927. Said John E. Gallois paid to said Margaret P. Gallois during the year 1928 cash and stocks totaling \$251,000.00, which amount was placed in said trust. Said agreement of December 1st, 1927 between said Margaret P. Gallois and said John E. Gallois provided that said John E. Gallois would have a full one-half interest in and to the corpus of said trust created by the trust agreement of August 9th, 1924, by said Margaret P. Gallois, subject to the right of said Margaret P. Gallois to use the income from said trust for her life and that said Margaret P. Gallois agreed not to use any of the corpus of said trust after said repayment of the \$251,000.00 by said John E. Gallois.

## VI.

Said petitioners John E. Gallois as Executor and Jeanne G. Hill as Executrix in the estate tax return referred to in paragraph 1 for the Estate of said Margaret P. Gallois reported 568 shares of the Raphael Weill common stock in said estate at a

value of \$51,120.00, whereas the actual value of said 568 shares of Raphael Weill & Co. common stock was \$45,440.00.

#### VII.

Said real estate in said trust referred to in respondent's deficiency letter, Exhibit A hereof, located at 326-334 Sutter Street, San Francisco, California, had a true value on August 8th, 1940, of \$55,000.00. [6]

#### VIII.

The 625 shares of Raphael Weill & Co. common stock referred to in respondent's deficiency letter incorporated herein as Exhibit A had a value of \$50,000.00 on August 8th, 1940, instead of a value of \$62,500.00 as determined by respondent in said deficiency letter.

Wherefore, your petitioners pray that this Court may hear the proceeding and determine that there is no deficiency due from the Estate of Margaret P. Gallois, Deceased, or from petitioners John E. Gallois, Executor, and Jeanne G. Hill, Executrix of said estate.

CLYDE C. SHERWOOD

JOHN V. LEWIS

JEROME POLITZER

Attorneys for Petitioner. [7]

State of California,

City and County of San Francisco—ss.

John E. Gallois, being duly sworn, says: That he is one of the petitioners above named and that he is the Executor of the Estate of Margaret P. Gal-

lois with full authority to act for said estate by filing this petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements therein contained are true, except those stated upon information or belief, and that as to those, he believes them to be true.

JOHN E. GALLOIS

Subscribed and sworn to before me this 20th day of November, 1943.

[Seal]                      THOMAS A. DOUGHERTY

Notary Public in and for the City and County of  
San Francisco, State of California.

State of California,

City and County of San Francisco—ss.

Jeanne G. Hill, being duly sworn, says: That she is one of the petitioners above named and that she is the Executrix of the Estate of Margaret P. Gallois with full authority to act for said estate by filing this petition; that she has read the foregoing petition and is familiar with the statements contained therein, and that the statements therein contained are true, except those stated upon information or belief, and that as to those, she believes them to be true.

JEANNE G. HILL

Subscribed and sworn to before me this 20th day of November, 1943.

[Seal]                      THOMAS A. DOUGHERTY

Notary Public in and for the City and County of  
San Francisco, State of California. [8]

## EXHIBIT A

(Copy)

Form 1236

June 1943

SN-ET-1

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco 5, California  
Aug. 31, 1943

Office of  
Internal Revenue Agent  
In Charge  
San Francisco Division

IRA:ET:90-D-CSW  
(C:TS:PD SF:HMS)

Estate of Margaret P. Gallois, Deceased,  
John E. Gallois, Executor and Jeanne G. Hill,  
Executrix,

c/o John E. Gallois,  
1143 Taylor Street,  
San Francisco, California

Re. MT-ET-11454-First California Estate  
of Margaret P. Gallois Date of death  
—August 8, 1940

Sir and Madam:

You are advised that the determination of the estate tax liability of the above-named estate, discloses a deficiency of \$19,323.36, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING

Commissioner,

(Signed) By R. L. SUTHERLAND

Acting Internal Revenue

Agent in Charge.

Enclosures:

Statement

Form of waiver [9]



## ESTATE TAX

San Francisco

IRA:ET:90-D-CSW

(C:TS:PD

SF:HMS

MT-ET-11454-First California

Estate of Margaret P. Gallois

Date of death—August 8, 1940

## STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	\$19,772.73	\$449.37	\$19,323.36

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest dated October 13, 1942, and to the statements made at the conferences held on October 27, 1942 and April 15, 1943, and various intermediate dates.

A copy of this letter and statement has been mailed to your representatives addressed ot Sherwood & Lewis, 333 Montgomery Street, San Francisco, California, in accordance with authority contained in the power of attorney executed by John E. Gallois, co-executer.

## ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return.....	None
Net estate for additional tax as disclosed by return.....	\$15,212.97
Additions to value of net estate and decreases in deductions:	
(a) Stocks and Bonds, Schedule B	
of return .....	\$ 5,942.50
(b) Transfers During Decedent's Life	135,330.43
	<hr/>
	141,272.93
Total .....	<hr/> \$156,485.90

Adjustment to Net Estate—(Continued)

Reductions in value of net estate and increases  
in deductions:

Reductions in value of net estate.....\$ None

(c) Funeral and Administration Expenses,

Schedule J of return:

J 2—Executors' Com-

missions .....\$157.70

J 3—Attorneys' Fees ..... 157.70      315.40

(d) Debts of Decedent, Schedule

K (?) of return ..... 227.58      542.98

Net estate for additional tax as adjusted.....\$155,942.92

Net estate for basic tax as adjusted .....\$ 95,942.92

EXPLANATION OF ADJUSTMENTS

Returned      Determined

(a) Stocks and Bonds, Schedule B of  
return:

Item 1 .....\$ 1,900.00      \$ 1,950.00

2 ..... 1,925.00      2,062.50

3 ..... 1,625.00      1,700.00

5—568 shares, Raphael Weill &

Co., common ..... 51,120.00      56,800.00

Totals above items .....\$56,570.00      \$62,512.50

Amount returned ..... 56,570.00

Net estate increased .....\$ 5,942.50

The values determined for items 1, 2 and 3 of Stocks and Bonds, as shown above, are based upon the means between published stock market quotations.

After careful consideration of all of the relevant factors bearing upon value, it is held that the capital stock of Raphael Weill & Co. had a value of \$100.00 per share on August 8, 1940. (See item 5 above.)

## Explanation of Adjustments—(Continued)

## (b) Transfers During Decedent's Life,

Schedule G of return	Returned	Determined
Item 5—Trust established by agreement dated August 9, 1924 .....	\$ 0.00	\$135,330.43
Amount returned .....		0.00
Net estate increased .....		\$135,330.43

It is held that the value of the property of the trust created by the instrument dated August 9, 1924, is includible in the gross estate under the provisions of section 811(c) of the Internal Revenue Code.

The value determined for said trust estate, as shown above, is established as follows:

Trust asset	Value
Subitem 1 Real estate (326-334 Sutter St., San Francisco, Calif.) .....	\$ 75,000.00
Subitem 2 102 shares Standard Oil Co. of California, common .....	1,874.25
Subitem 3 625 shares Raphael Weill & Co., common .....	62,500.00
Total .....	\$139,374.25
Less: Charges as follows:	
Subitem 4 Taxes payable .....	\$3,293.82
Subitem 5 Money of tenants held as security .....	750.00
Net value includible .....	\$135,330.43

The value determined for the shares of stock listed at subitem 2 above, is based upon the mean between published stock market quotations. The value of the shares of stock of Raphael Weill & Co. listed at subitem 3 above is determined on the same basis as are similar shares referred to under adjustment (a) hereinabove.

After careful consideration of all of the relevant factors bearing upon value, it is held that the real property situated at 326-334 Sutter Street, San Francisco, California, had a value of \$75,000.00 on August 8, 1940.

Explanation of Adjustments—(Continued)

(c) Funeral and Administration Expenses, Schedule J of return: Returned Determined

J 2—Executors' Commissions .....	\$1,450.00	\$1,607.70
J 3—Attorneys' Fees .....	1,450.00	1,607.70
	<hr/>	<hr/>
Totals above items .....	\$2,900.00	\$3,215.40
Amount returned .....		2,900.00
	<hr/>	<hr/>
Deductions increased .....		\$ 315.40

Executors' commissions and attorneys' fees are allowed as deductions under the provisions of Sections 81.33 and 81.34 of Treasury Regulations 105 in the increased amounts as shown above, which the evidence submitted by you discloses will be claimed, and which it is reasonably expected will be paid.

(d) Debts of Decedent, Schedule K of return:

Total of all items listed in return.....	\$2,502.55	\$2,730.13
Amount returned .....		2,502.55
	<hr/>	<hr/>
Deductions increased .....		\$ 227.58

The adjustment of the total deduction for Debts of Decedent, Schedule K of the return, as shown above, results from the correction of an error in addition made by you in your return.

## COMPUTATION OF ESTATE TAX

	Returned	Determined
Gross estate .....	*\$ 78,208.50	\$203,278.45
Deductions for basic tax..*	118,307.55	107,335.53
Net estate for basic tax.....	\$ 0.00	\$ 95,942.92
Gross estate .....	*\$ 73,520.52	\$203,278.45
Deductions for additional tax .....	* 58,307.55	47,335.53
Net estate for additional tax .....	\$ 15,212.97	\$155,942.92
Gross basic tax .....	\$	1,418.86
Credit for estate and inheritance taxes..		1,135.09
Net basic tax .....		\$ 283.77
Total gross taxes, (basic and additional)	\$	19,110.30
Gross basic tax .....		1,418.86
Net additional tax .....		17,691.44
Total net basic and additional taxes.....		\$17,975.21
Defense tax (10 percent) .....		1,797.52
Total tax payable .....		\$19,772.73
Estate tax assessed:		
Amount shown on return and assessed—		
Original, list Sept. 1941 (S), page 100, line 3—		
First California District .....		449.37
Deficiency .....		\$19,323.36

\* Note: In your return you listed two transfers made by decedent at items 2 and 3 of Schedule G of Transfers during Decedent's Life. The value of these transfers, in the aggregate amount of \$11,515.00, was added by you to the gross estate in error in Schedule O, Recapitulation, of the return. Offsetting this entry, you listed in said Schedule O a deduction for "non-taxable gifts Schedule G" in the same aggregate amount of



\$11,515.00. It is held, that both these entries in your return are in error, should be eliminated, and they have been so considered hereinabove.

[Endorsed]: T.C.U.S. Filed Nov. 26, 1943. [13]

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[Title of Tax Court and Cause.]

### ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in subparagraphs I, II, and III of paragraph 4 of the petition.
5. I. Admits the allegations contained in subparagraph I of paragraph 5 of the petition.  
II. Admits the allegations contained in subparagraph II of paragraph 5 of the petition. [14]  
III. Admits the allegations contained in subparagraph III of paragraph 5 of the petition.  
IV. For lack of information and belief denies the allegations contained in subparagraph IV of paragraph 5 of the petition.

V. For lack of information and belief denies the allegations contained in subparagraph V of paragraph 5 of the petition.

VI. Admits that petitioners John E. Gallois as Executor and Jeanne G. Hill as Executrix in the estate tax return referred to in paragraph 1 for the Estate of said Margaret P. Gallois reported 568 shares of the Raphael Weill common stock in said estate at a value of \$51,120.00; denies that the actual value of said 568 shares of Raphael Weill & Co. common stock was \$45,440.00.

VII. Denies the allegations contained in subparagraph VII of paragraph 5 of the petition.

VIII. Denies the allegations contained in subparagraph VIII of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

[Signed]

J. P. WENCHEL TMM

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

T. M. MATHER,  
Special Attorney, Bureau of Internal Revenue.

TMM/s 12/20/43

[Endorsed]: T.C.U.S. Filed Dec. 28, 1943. [15]

Before the Tax Court of the United States

Docket No. 3507

In the Matter of

ESTATE OF MARGARET P. GALLOIS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Room 401, Civic Auditorium,  
San Francisco, California,

September 22, 1944—10:00 a. m.

(Met pursuant to notice.)

Before:

Honorable Ernest H. Van Fossan,  
Judge

Appearances:

John V. Lewis, Esq., 333 Montgomery Street,  
San Francisco, California, appearing on be-  
half of Estate of Margaret P. Gallois, Peti-  
tioner.

Clyde C. Sherwood, Esq., 333 Montgomery  
Street, San Francisco, California, appearing  
on behalf of Estate of Margaret P. Gallois,  
Petitioner.

Jerome Politzer, Esq., Mills Building, San  
Francisco, California, appearing on behalf  
of Estate of Margaret P. Gallois, Petitioner.

T. M. Mather, Esq., (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, Respondent. [19]

## PROCEEDINGS

The Clerk: At this time we call Docket 3507, Estate of Margaret P. Gallois.

Mr. Mather: Ready for Respondent.

The Clerk: Will you state your appearance for the record, please?

Mr. Sherwood: For the Petitioner, Clyde C. Sherwood, and my colleague, John V. Lewis.

The Clerk: Is he here?

Mr. Sherwood: He is not here. I believe he is in the hall.

The Clerk: He has to appear. If he is not at counsel table, we cannot accept him.

Mr. Mather: T. M. Mather for the Respondent.

(Whereupon Mr. Lewis entered the Court Room.)

Mr. Lewis: John V. Lewis and Jerome Politzer.

The Clerk: Are you all going to be here?

Mr. Lewis: Yes.

The Clerk: Have you all been admitted to practice?

Mr. Sherwood: Yes.

The Clerk: How do you spell your name, Mr. Politzer?

Mr. Politzer: P-o-l-i-t-z-e-r.

The Clerk: Are all three of you at 333 Montgomery Street?

Mr. Politzer: No, I am in the Mills Building.

The Clerk: Thank you.

The Court: You may state the issues, if you will, Mr. Sherwood.

Mr. Sherwood: Thank you, your Honor.

## OPENING STATEMENT ON BEHALF OF PETITIONER

By Mr. Sherwood:

Mr. Sherwood: In this case it is admitted by the pleadings that John E. Gallois is the Executor and his sister is the Executrix of the Estate of Margaret P. Gallois. Margaret P. Gallois died August 8, 1940.

The notice of deficiency in this matter was mailed to the Petitioners on August 31, 1943.

The taxes in controversy are estate taxes claimed to be due for the year 1941. The petition was filed on the basis of errors made by the Commissioner in two respects.

The first matter involves the valuation of various properties included in the Estate. We have decided to present no evidence on those matters. We abandon the contention so raised in our petition.

The matter which we do wish to present to this Court involves the second error made by the Commissioner. The Commissioner included in the Estate of Margaret P. Gallois for tax purposes certain properties of the value of \$135,330.43, which properties were held in trust under the trust agree-



ment executed August 9, 1924, a copy of the trust agreement being [21] annexed as Exhibit "B" to the petition in the case.

The Commissioner held that the value of the trust property was includable in the Estate under the provisions of Section 811(c) of the Internal Revenue Code.

The answer of the Commissioner admits that during the years from 1919 to 1922, John E. Gallois, one of the Petitioners, borrowed \$251,000 from the decedent, Margaret P. Gallois, the grantor of the trust. The Petitioner will prove that in 1924, at the time Margaret P. Gallois made this trust, she borrowed heavily on all of her property, and she had given all of the money which she had obtained from those borrowings to her son, John E. Gallois, and that at that time John E. Gallois was indebted to her in excess of a quarter of a million dollars.

She had another child, Jeanne Gallois Hill, whose husband, Horace Hill, had been a wealthy man, and who at that time had suffered severe reverses, so that the Hills were in straitened circumstances.

Mrs. Gallois' property was heavily encumbered, and John E. Gallois was at that time very much encumbered. He had stocks which had fallen to a point where he was unable to make any payments at all to his mother. The Hills became worried about the fact that John E. Gallois had been loaned virtually all of his mother's estate, and they brought various pressures to bear upon the mother to make

some provision for the Hill [22] family, as a result of which Mr. Gallois had the trust prepared by Mr. Percy Towne, her attorney, and the provisions of that trust appear in the pleadings, and show that the trust estate was to be held for the benefit first of Margaret Gallois for her life, and then for her daughter and her daughter's issue, but it contained a provision that if John E. Gallois should repay the monies which he had borrowed, then he would share in the trust and have a one-half interest in the trust property at the time of her death, but not subject to the restraints of the trust. In other words, he would take the property free and clear at the time of her death.

By 1927, John E. Gallois had commenced to regain his financial position. His stock were going up, and he was able to make some payments on account.

From April 1, 1928 to—no, September 13,—withdraw that.

From December 19, 1927 to September 13, 1928, he paid his mother a total of \$42,000. The stock market continued to go up, and in that latter part of 1928, John E. Gallois was financially able to repay the entire borrowings that he had had from his mother.

At that time he will have proved that he had conversations with his mother concerning the trust, and he felt that if he repaid the money to his mother she would be subject to pressure from the Hills to make advances to them. [23]

Mr. Hill had lost upward of a million dollars, and was in very straitened circumstances, and Mr. Gallois wished to have some limitations placed in the trust so that if he paid this money, his mother would have protection for her lifetime, would not be induced to part with the money for the benefit of the Hills and he would get his half at the time of her death.

So, in the latter part of October, 1928, John E. Gallois made an agreement with Margaret P. Gallois in which he agreed to pay the balance of the indebtedness, although it had long since been barred by the statute of limitations of the State of California. He recognized it as a moral obligation, and he agreed to repay all of the funds. In consideration of that agreement, Margaret P. Gallois agreed to the following conditions:

First, she would not withdraw any funds from the trust in excess of the income from the said trust. The original trust agreement provided that she could request the Trustees for additional funds if they were necessary for her maintenance, in the event that the income was not sufficient, and this was the right to request the Trustees which she agreed to waive and not exercise.

Second, that upon the making of substantial payments on account of said indebtedness by John E. Gallois, John E. Gallois would be made a Trustee of the trust. The original [24] Trustees were two persons, Cook and Pissis, who were not immediate members of the family. By this agreement John E. Gallois was to be substituted as a Trustee, and

the mother desired that his sister also be substituted, so that the upshot of the agreement was that both of the original Trustees who served with Margaret P. Gallois were superseded by John E. Gallois and his sister, Jeanne Gallois Hill.

Mr. Gallois insisted on being a trustee over the objection of his sister, because he wished to protect his interest in the trust property, and to enforce his rights under the agreement with his mother.

Third, it was agreed that upon payment of the \$251,000 indebtedness in full, John E. Gallois would be entitled to a full one-half interest in the corpus of the said estate, subject to the rights of Margaret P. Gallois to use the income from the trust for her life. This agreement was carried out.

On November 7, 1928, a decree of the Superior Court of the State of California, in and for the City and County of San Francisco, permitted the withdrawal of Emile A. Pissis and W. H. Cook, original Trustees, and substituted therefore John E. Gallois and Jeanne Gallois Hill.

A day or two after the substitution of himself as trustee, John E. Gallois paid to the Trustees the sum of \$209,000, which represented the balance of his indebtedness.

Margaret P. Gallois was in good health in 1924 when [25] she made the trust. She was in good health throughout her entire life, until up to the very day of her death. She died in 1940 at the age of 84. Upon her death a decree of the Superior Court of this City and County adjudged John E. Gallois to be entitled to one-half of the trust prop-



erty free and clear of the terms of the trust. The other one-half remains in trust for Jeanne Gallois Hill to be distributed to her issue at the time of her death.

The Court: Mr. Mather.

### OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. Mather:

Mr. Mather: If your Honor please, in determining the deficiency in this case, the Commissioner has included as a part of the gross estate of this decedent the value of the property in the trust. He has included it under the provisions of Section 811(c) of the Internal Revenue Code.

It is the position of the Respondent in this case that the transfer in trust was a transfer to take possession enjoyment at or after death, that there was a provision in the trust instrument with respect to reservation, whereby this property could revert to the trustor. There was also provision in the trust instrument with respect to invasion of corpus, so at no time was it possible to determine whether or not any amount would go to the beneficiaries.

The trust instrument, in Paragraph 5 reads as [26] follows:

“If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois (who is the trustor) then this trust shall terminate and the trust fund shall vest in said Margaret P. Gallois.”



There is also provision in the trust instrument for invasion of the corpus by the trustor, and Paragraph 9 of the trust instrument we believe to be a testamentary disposition of property. It reads:

“Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the monies received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois.

“Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her [27] death, then fifty (50%) per cent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in the said John Gallois and the balance of said property shall vest as hereinbefore provided.”

The remaining provision of that deals with the death of the trustor.

So, we take the position that the Commissioner properly included the value of this trust property in the estate for the reason that the transfer was to take effect and possession after death, that the trustor had a possibility of reverter, and so provided in the trust instrument, and that the trust instrument provided that she, the trustor, could invade the corpus, so it would be impossible to determine whether or not at the time of her death anything would be available for beneficiaries.

The Court: You may proceed with the evidence.

Mr. Sherwood: I will call Mr. John Gallois.

Whereupon,

### JOHN EUGENE GALLOIS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Sherwood: [28]

Q. Will you state your name and address for the record, please?

A. John Gallois, John Eugene Gallois, 1143 Taylor Street, San Francisco.

Q. You are one of the petitioners in this matter, Mr. Gallois?           A. I am.

Q. And you are one of the Executors of the Estate of your mother, Margaret P. Gallois?

A. Yes.

Q. You are also the John Gallois who was stated as Trustee in the trust we have discussed here?           A. Yes.

(Testimony of John Eugene Gallois.)

Q. On or about August of the year 1924, Mr. Gallois, were you indebted to your mother in any amount?      A. I was.

Q. Approximately how much?

A. About a quarter of a million dollars.

Q. From what sources had your mother obtained the monies that she had loaned you?

A. From loans on her securities and properties.

Q. What was your financial position at that time, relative to your ability to repay the money?

A. At that time I could not have repaid it.

Q. Was there any particular reason why you were unable [29] to?

A. I was overstepped in the stock market.

Q. Had you used the money which you had received from her to invest in stocks?

A. I had.

Q. What was the state of your mother's health in 1924?

A. She was a woman around 68 years of age, in very good health for that age.

Q. And she died at the age of 84, I believe?

A. Yes.

Q. What was the condition of her health throughout the period of 1924 until the date of her death?

A. She was in good health until the day of her death.

Mr. Sherwood: I have here, your Honor, a list

(Testimony of John Eugene Gallois.)

of the descendants of Margaret P. Gallois, and for purposes of convenience I have had them typed in a form that the Court can readily follow, and with counsel's consent, I would like to have this offered as our first exhibit.

The Court: Is there any objection, Mr. Mather?

Mr. Mather: No objection.

The Court: Exhibit No. 1.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

[Printers' Note: Set out in full at page 49.]

Mr. Sherwood: I would like to identify the material on it from the witness, your Honor. [30]

By Mr. Sherwood:

Q. Mr. Gallios, I show you a copy of the Exhibit. The letter "b" which appears under each name indicates the correct birthday and year of birth of each of the parties, does it not, Mr. Gallios? (Hanging)

A. I would say that is correct, except I wouldn't say positively the dates of the two last great grandchildren.

Q. As to the two great grandchildren——

A. I know that the year is correct and that the month is correct, but I wouldn't say those two last days were. I myself don't personally know.

Q. Referring to Jeanne Poett.

(Testimony of John Eugene Gallois.)

A. Born March 4, 1942, and Margaret Haley, born December 17, 1942. I know it is December and March, but the actual date I don't know.

Q. I believe that is sufficient for our purpose, then. And the letter "m" which appears before Harry Poett and John Haley refers to the fact that Cynthia Hill and Peggy Hill, respectively, married those two gentlemen?

A. No, that is the name of those children, isn't it? No, married, that's right.

Q. I merely want to bring out that the letter "b" that is used stands for "born," and "m" stands for "married."

Mr. Gallios, your sister was married to Horace Hill at a time prior to 1924? [31]

A. Horace Hill Jr.?

Q. Yes. And what was Horace Hill Jr.'s financial position in the period from 1924 to 1928?

A. Well, I can say that he inherited about a million dollars from his father, and that during that period he began to get—well, he spent the principal and became worse and worse, as it went along.

Q. Did he lose substantially all of that money eventually?

A. Well, he went through bankruptcy, and through the Frazier-Lemke Act.

Q. Did he take the benefit of the moratory provisions of the Frazier-Lemke Act?

A. Yes.

Q. So he was, we could say, in very straitened circumstances during this period?



(Testimony of John Eugene Gallois.)

A. He was.

Q. You are familiar with the trust instrument which is marked as an exhibit and annexed to the petition which you signed in this matter?

A. The original instrument?

Q. Yes.           A. Yes.

Q. And when—withdraw that.

Were you consulted or made aware of the fact that this [32] trust instrument was being executed at the time it was executed?

A. I was ignorant of it.

Q. When, approximately, did you first learn of the existence of this trust agreement?

A. A year or two after this trust was formed, there was a sale of the California Street property, and the Title Insurance Company, in order to give a proper deed, required my signature.

Q. Had the trust been recorded?

A. It was never recorded, to my knowledge.

Q. And therefore your signature was necessary, was that right?

A. The Title Insurance Company required that my signature be on this deed, and that is the first knowledge I had of the trust. I think that was in '26 or '27.

Q. And after you were made aware of the existence of the instrument by the Title Insurance Company, did you ask your mother concerning it?

A. I discussed it with her all the time.

Q. Did she give you any reasons why she had executed the trust agreement?

(Testimony of John Eugene Gallois.)

A. She said that she wanted to see that my sister was protected, inasmuch as she had given me such a big portion of my portion of the estate, and that is the reason that she [33] formed this trust.

Q. Did you have any conversation about the inclusion therein of that provision which Mr. Mather read a while ago, that if you paid up your indebtedness you would be entitled to share in the trust?

A. Oh, I used to talk about that quite often to her.

Q. Can you recall the first time you discussed the trust with her, if she made any remarks about whose idea it was, including that, and so forth?

A. Well, she said how she thought she had made a very fair trust. The way it had been written up at first, she thought it wasn't quite fair to me if I should, through a miracle, if I ever should repay her that amount, and she said that she insisted herself upon a provision in there that in case I did perform this miracle, that I would be protected.

Q. Did your financial position improve after the time when you became aware of the existence of the trust?      A. Not until about '27, 1927.

Q. Could you state briefly just what the circumstances were and why it began to improve?

A. Well, I was tied up in the stock of the Federal Telegraph Company, which later became the Kolster Company, and at the time that this trust was formed, the stock was selling around \$5 a share. I had an interest of 30,000 shares, and by the time 1927 came, the stock started to go [34] up, and it

(Testimony of John Eugene Gallois.)

went up to as high as \$90 in the period up to 1928, and I got out very well, and I was able to repay this indebtedness.

Q. As this stock started to go up, but before it got up very far, was any discussion held as to the advisability of your selling out some stock and making payments on this indebtedness?

A. When the stock got up to around 15 and 16, I was being pressed continuously.

Q. By whom?

A. By—especially my brother-in-law.

Q. Mr. Hill?

A. Mr. Hill, yes, and he would discuss it with my mother, that I should sell some of that stock to repay some of the obligations, or partly repay them. I had a great deal of confidence in the stock, and I was stubborn and insisted on holding on. My mother——

Q. Pardon me just a moment.

These obligations you are referring to were the monies that your mother had borrowed on her security, which included the trust properties?

A. And some of her personal properties.

Q. She had borrowed on the trust properties before the creation of the trust? A. Oh, yes.

Q. And those monies were overdue?

A. They were overdue and the banks were pressing us all around. The banks were trying to get me to sell, because I think that naturally they were

(Testimony of John Eugene Gallois.)

after that block of stock, and there was pressure coming on from all around.

Q. Did you in fact make some sales of stock and make some payments on account?

A. There were some things pressing against my mother and her personal estate, not the trust, at that time, and I sold some stock at prices that I figured were far lower than they should have been, just to help her out, and I made some payments to her personally.

Q. And the total of those payments were what?

A. Oh, around between forty and fifty thousand dollars.

Q. I believe the records show \$42,000, do they not?

A. Whatever the records show there, I know is the——

Q. Then did you have any discussion with—withdraw that.

I believe you said that you then soon became in a position where you sold out and was in a position to take care of all of this indebtedness?

A. Well, it was a period of about eight or nine months until I really was in a position to take care of all the indebtedness, that is, from the time of those first payments that I made. [36]

Q. The stock was going up progressively all of that time, was it?      A. Yes.

Q. It went up from 16 until finally it got about 90?      A. 90.



(Testimony of John Eugene Gallois.)

Q. In October of 1928, were you then in a financial position to pay this obligation, the remainder of it? A. All of it.

Q. And did you have any conversations then, on or about October, 1928, with Margaret P. Gallois concerning the repayment of this money and the trust? A. I did.

Q. Will you tell approximately the time of the conversation?

A. Oh, probably the end of September and during October of 19—I believe it was '27 or '28, 1928.

Q. And your mother at that time lived where?

A. At the Fairmont Hotel.

Q. Were these conversations held in her room?

A. They were held in her room.

Q. Do you recall whether anyone else besides you and your mother were present at these conversations?

A. I generally was alone. I cannot recall of anybody—my sister might have been there once in a while, I don't know. I can't—we quite often talked about these things [37] during that period.

Q. Did you come to any definite understanding with your mother as to what you would do as to repaying this money, and what she would do if you repaid it? You can answer that yes or no.

A. Yes.

Q. All right. Now, will you state what that understanding was?

A. Well, I realized at that time that I was morally obligated to my mother, and that I was not



(Testimony of John Eugene Gallois.)

legally obligated, and having gone through the vicissitudes of those past years and knowing how my mother had worried through those past years, and seeing my sister's financial condition becoming worse and worse, I felt that the shoe was on the other foot at that time, and that I wanted to protect my sister and protect myself. At that time that trust, before I made any re-payments, had no financial backing.

Q. You mean by that that the indebtedness——

A. Was greater.

Q. ——than that market value at that time?

A. Than the market value of the trust. So I realized that I could have made several arrangements with my mother which would have protected her, but I thought that inasmuch as that trust had been founded partly due to what she thought were my errors, that it would only be the fair thing to have [38] this thing go back into the trust, but if that took place, I wanted to have the control of that trust, so that we would never get in the condition that it was in again. In other words, we were to pay off the indebtedness of the trust and really make it something that was good and sound and that never could be touched. I said to mother, I said, "Mother, I am perfectly willing to do this, although I realize that I don't have to do it, with the understanding that you name me as a Trustee, and also that we will never get into this mess again, and that we will never hit the principal (or the

(Testimony of John Eugene Gallois.)

corpus, if you want to call it that) and so, to protect me, I must be a trustee." To which she agreed.

Q. Did you have anything definitely in mind as a possibility of what your mother might be induced to do with the principal if you did not place this restriction on it?

Mr. Mather: If your Honor please, if this is for the purpose of showing that this was a revocable trust, I will object to it. This is a trust instrument in writing, and is it counsel's position that this is a revocable or an irrevocable trust?

Mr. Sherwood: It is our position that Mrs. Gallois and her son had made an executed agreement. I intend to go on and prove that it was executed by the payment on his part of the money, that therefore it was an additional restriction which the creator of the trust voluntarily put on the trust, [39] and received a valuable consideration therefor.

Mr. Mather: Is it in writing, this restriction?

Mr. Sherwood: It doesn't have to be in writing, under the laws of this State, if it is executed.

The Court: The question is, though, was it in writing?

Mr. Sherwood: It was not in writing. However, I would like to qualify that. The trust instrument itself was not specifically amended, but there are minutes of trustees' meetings which show the agreement, I believe. There was not a formal writing, no, your Honor, but we are relying upon the fact that the agreement was made and was completely executed by the parties.

(Testimony of John Eugene Gallois.)

Mr. Mather: Is this testimony directed to varying the terms of this trust instrument?

Mr. Sherwood: As you say, it is varying the terms. It was an amendment of them, an additional restriction placed upon the creator of the trust, certainly. So, I think the issues that Mr. Mather presented in his opening statement, presented that precise point.

The Court: He may answer.

The Witness: Will you read the question?

(Question read by reporter.)

A. Well, I felt that inasmuch as my mother had done something for me before, she might turn around and do some- [40] thing for my sister or somebody else, and I had that firmly in mind, as I stated before.

Q. Pardon me, I didn't notice that you said that before.

Did your mother agree to the conditions which you have just outlined?

Mr. Mather: Now, if your Honor please, there is a trust instrument here.

The Court: Are you objecting?

Mr. Mather: Yes, I am objecting, if your Honor please.

The Court: I will sustain the objection.

Mr. Lewis: Your Honor, I might state there was completely executed an oral agreement here, which, under the laws of this State, was specifically enforceable as against the mother, which would vary the terms.

(Testimony of John Eugene Gallois.)

The Court: To what are you addressing your remarks?

Mr. Lewis: To you, your Honor.

The Court: I didn't say to whom, I said to what?

Mr. Lewis: On the question as to whether or not we can ask him about this agreement as to what his mother agreed to.

The Court: The objection is sustained because of the form of your question. It is assumed that laid down conditions which she had not done. [41]

By Mr. Sherwood:

Q. Will you state, Mr. Gallois, any further conversation that you recall with your mother, referring not only to what you said, but what she may have said, if she said anything?

A. Well, I made it very specific that I would not put this money back into the trust or pay this thing back unless she agreed to this thing.

Q. What did she say?

A. And she agreed to it, and that is why I was made a Trustee.

Q. You were made a Trustee? A. I was.

Q. Was your sister made a Trustee also?

A. She was.

Q. The two original Trustees were whom?

A. William H. Cook, Secretary of The White House, and Emile Pissis, my mother's brother.

Q. And you were appointed in the stead of one and your sister was appointed in the stead of the other? Your mother remained as Trustee?



(Testimony of John Eugene Gallois.)

A. She remained.

Q. Following the appointment of yourself as Trustee, did you in fact pay the entire indebtedness which you owed your mother? [42]      A. I did.

Q. That is the amount that you paid, in addition to the amounts that you had previously paid to her?

A. I did.

Q. Those amounted to the whole amount of \$251,000.?

A. I paid back, besides what I had originally paid her back, \$205,000.

Q. That figure was \$209,000, according to our petition.

A. \$209,000, the statement shows it, I think.

Mr. Sherwood: In order to have before the Court the complete history of this trust, we have obtained certified copies of four decrees of the Court having jurisdiction in this State of the trust. The first one is an order appointing Trustee, that is the time that the witness just referred to, when he and his sister were substituted for the original Trustees. At the same hearing, the Court accepted the first account and made a decree accepting the settlement of the account of the original Trustees in order that they might be discharged. Then, after Mrs. Gallois' death, the surviving trustees filed an account which was accepted by the Court, and I have a decree terminating her life estate in the trust and settling the account of the surviving Trustees and of the decedent.



(Testimony of John Eugene Gallois.)

Then, there was some question of the rights of the [43] minor children, and so on, at the time, and some real property was sold, and a new decree was given by this Court, which passes upon the reversion rights of the children, who were then living, and the Court expressly withholds the passing of payment upon the probability of new errors coming into being.

I think the four together give the Court a clear picture of the operation of this trust, and I would propose to offer them as one exhibit.

Mr. Mather: No objection.

The Court: Exhibit 2 in evidence.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 2.)

[Printer's Note: Set out in full at page 50.]

Mr. Sherwood: You may cross examine.

#### Cross Examination

By Mr. Mather:

Q. Did your mother write you a letter on November 2, 1928, Mr. Gallois, with respect to the note that you were about to give to her?

A. Well, I don't know. She wrote me—that is, I don't know. I don't know what you have reference to.

Q. You did give a note to your mother, did you not, for \$251,000?

A. Well, yes, I gave a note, yes.

(Testimony of John Eugene Gallois.)

Q. And at the time it was agreed that you were to be [44] appointed a Trustee of the trust, was it not?

A. You mean in the letter there, there was something that I signed for the purposes of accounting to show that I had made that money. I remember a letter like that, if that is the letter you have reference to.

Mr. Sherwood: I suggest we show the witness the letter. It is a long time ago, Mr. Mather.

Mr. Mather: I will get to it presently.

By Mr. Mather:

Q. It was agreed at the time you executed this note, Mr. Gallois, that you were to be appointed one of the Trustees of this trust, was it not?

A. Correct, yes.

Q. And is it my understanding that that was the condition upon which you executed the note, that you would be appointed a Trustee?

A. Correct.

Q. There was also a further condition that you would resign as a trustee 90 days after your mother's death, was there not?

A. That is correct.

Q. You know the date of the note that you executed in connection with this matter, or do you have the note?

Mr. Sherwood: May I say, it appears in the Court decree that it was dated October 30, 1938.

It is in the decree that was just placed in evidence there.

(Testimony of John Eugene Gallois.)

Mr. Mather: I see.

By Mr. Mather:

Q. In connection with the conversations that you had with your mother about the note, she, on November 2, 1928, wrote you a letter, did she not? (Handing.)

A. Well, there was a letter that I demanded. I don't know if that is the letter that I demanded of her.

Q. Is that your understanding of the agreement that you had with her at that time?

A. (After examining.) That is.

Q. Does that letter read as follows:

“As you are about to give your note to myself, Emile A. Pissis and W. H. Cook, as trustees, of the trust created by me in August, 1934, for the sum of \$251,000.00 and as there has been paid to me the following: \$32,000.00 on April 1st, 1928, \$5,000.00 on September 13, 1928, and fifty shares of the White House stock, at a cost of \$4900.00 which you purchased at my request for me, December 19th, 1927, and as these sums and these shares were received from Mr. Horace L. Hill by me for the purpose of applying said amounts and the value of said stock on your said indebtedness of \$251,000.00 owing to the trustees of the said trust created by me in August, 1924, I now desire to state that I have received said sums [46] and said shares of stock from Mr. Hill for the purpose of applying the same on your said account.

“The foregoing payments reduce your indebted-

(Testimony of John Eugene Gallois.)

ness to said trust in the amounts above set forth and I agree to hold myself accountable to said trusts for said sums and the value of said shares."

Did the letter read like that?

A. Correct.

Q. And that correctly sets forth the understanding that you had with your mother at that time?

A. I paid over the sums mentioned in this letter to my mother previous to the re-payment of the \$209,000. Inasmuch as I was indebted to the trust for \$251,000, I was not going to pay the rest of the \$209,000 until I was assured that I would get complete credit for having repaid this whole indebtedness to her. Had I not done that, I would not have felt that at her death I would have gotten what was coming to me, because it would not have shown that I had repaid this in full. Therefore, I demanded this thing as a matter of accounting, and I knew perfectly well that this money had not gone into the trust, but that it was paid to my mother, and this is a true statement of what you asked me. It is exactly as the matter took place.

Mr. Mather: That is all. No further questions.

The Court: Any other questions? [47]

Mr. Sherwood: Just a moment, your Honor.

### Redirect Examination

By Mr. Sherwood:

Q. Mr. Gallois, I want to just be sure that there is no confusion in the record on testimony concerning this letter.

Was this letter given to you before or after you

(Testimony of John Eugene Gallois.)

had made the agreement with your mother, that she would have you appointed a Trustee, and the other conditions that you outlined?

A. Was it given before or after?

Q. Yes.

A. Well, as I said before, there had been discussions going right along all the time, and this is—when was it? That is 20 years ago, isn't it, you are asking me about? That is pretty hard to answer, because as a matter of fact in the past, my mother loaned me all this money without even the stroke of a pen, and this letter was given to me at my request.

Q. But did it comprise all of the agreements that you had with your mother?

A. Well, the other agreement was that I was to be a Trustee, and that she would not touch the principal of the trust, and I also knew that once that I was a Trustee, that she could not do that, because I could have stopped it, and [48] I was perfectly protected, and as I say, having a quarter of a million dollars that my mother had handed out to me just on my word and on her word, I didn't think it was necessary between us to have anything. The only thing I did that was for the purpose, accounting purposes. I wanted to know that I was vested in \$251,000, if I wanted to borrow on that, which I did later on, from Russell Hiller. I figured I was vested in \$251,000, and if I had not repaid the thing in full, or if there had been no record that I paid her in full, I would not have been vested in that.



(Testimony of John Eugene Gallois.)

Q. You state that you did continually borrow money on your interest? A. I did.

Q. Did your mother know about that borrowing?

A. She agreed to it and signed it as a Trustee.

Mr. Sherwood: I have here, your Honor, minutes of the meetings of the Trustees of Margaret P. Gallois' trust, referring to the matters which the witness has testified to, and I will just ask the witness:

By Mr. Sherwood:

Q. Do you know where the original minutes are at the present time, Mr. Gallois?

A. Well, they were in the hands of Mr. Platt Kent, the attorney for the Anglo California Trust, and Mr. Kent died, and I think that probably the records of the Anglo California [49] Trust will have this. I don't know, the way some of the banks are on things so far back, it is pretty hard to find them.

Q. Did Mr. Kent furnish you with these copies?

A. He furnished Mr. Percy Towne with those copies.

Q. Who was Mr. Towne?

A. Mr. Towne was the attorney for my mother, and the attorney for the trust, and these were among the papers of the trust.

Mr. Sherwood: Mr. Mather said he has no objection to their being received in evidence, your Honor.

The Court: Exhibit 3 in evidence.

(Testimony of John Eugene Gallois.)

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 3.)

[Printers' Note: Set out in full at page 85.]

Mr. Sherwood: I think that is all, your Honor.

The Court: Any other questions, Mr. Mather?

Mr. Mather: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Sherwood: That is all the testimony we have, your Honor.

The Court: Anything on behalf of the Government?

Mr. Mather: Just one moment.

Respondent rests, if your Honor please.

The Court: I think this case lends itself to alternate briefs rather than concurrent briefs. [50]

Mr. Sherwood: It seems to me, your Honor, that alternate briefs would be more satisfactory.

The Court: Thirty days is allowed the Petitioner for opening brief; thirty days thereafter for Respondent's brief, and thirty days for rebuttal.

Mr. Sherwood: That is satisfactory, your Honor. Thank you.

The Clerk: That is October 22nd for the main briefs. Respondent's reply, November 22nd. Petitioner's reply, December 22nd.

(Whereupon, at 11:10 a.m., Friday, September 22, 1944, the hearing in the above-entitled matter was closed.) [51]

# PETITIONER'S EXHIBIT No. 1

DESCENDANTS OF MARGARET P. GALLOIS

MARGARET P. GALLOIS

b. March 17, 1856

:

JOHN E. GALLOIS  
b. December 28, 1885

JEANNE GALLOIS HILL  
b. December 17, 1887

:

:

:

:

Cynthia Hill  
b. December 28, 1916  
m. Harry Poett, Jr.

Peggy Hill  
b. November 26, 1918  
m. John Haley

Horace Hill, III.  
b. March 23, 1923

:

Harry Poett, III.  
b. November 19, 1938  
Carolann Poett  
b. February 29, 1940  
Jeanne Poett  
b. March 4, 1942

Louise Haley  
b. February 17, 1940  
Margaret Haley  
b. December 17, 1942

## PETITIONER'S EXHIBIT No. 2

Peter A. Breen  
407 deYoung Building  
EXbrook 3288  
San Francisco, California

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

No. 85,434 Dept. No. 9

In the Matter of the Estate of

MARGARET P. GALLOIS, sometimes known as  
MARGARET PISSIS GALLOIS or MARGUERITE PISSIS GALLOIS,

Deceased.

DECREE TERMINATING LIFE  
ESTATE, ETC.

The petition of John E. Gallois for a judgment establishing the fact of the death of the above-named decedent and fixing the extent and character of the trust estate created by said decedent by a certain trust instrument dated August 9, 1924, and the portion thereof which has vested in said petitioner by reason of the death of said decedent and the portion thereof to remain in the possession of said trustees came on regularly for hearing before the above entitled Court, Honorable Frank H. Dunne (since deceased) Judge presiding, and it having been proved to the satisfaction of the Court that notice of said petition and the time set for

## Petitioners' Exhibit No. 2—(Contd.)

the hearing thereof had been given in the manner and form and for the period required by law; and oral and documentary evidence having been introduced by said petitioner, the Court being duly advised in the premises, found that all the facts alleged in said petition were and are true;

That the above-named decedent died in the City and [53] County of San Francisco, State of California, on the 8th day of August, 1940; that said decedent at the time of her death was a resident of said City and County and left estate therein consisting of personal property and a certain document purporting to be her Last Will which, upon due proceedings had and taken, was admitted to probate by an order of the above entitled Court, duly given and made on the 12th day of November, 1940, and John E. Gallois, said petitioner, and Jeanne G. Hill, nominated as such by said Will, were appointed Executor and Executrix thereof by said order, and Letters Testamentary were issued to them on said 12th day of November, 1940, which are still in full force and effect;

That said proceedings for the administration and settlement of said decedent's estate are still pending, and no petition has been filed for distribution of said estate or any part thereof;

That at the time of said decedent's death there was vested in three certain persons as Trustees all that certain real property situate in the City and County of San Francisco, State of California, described as follows:



## Petitioners' Exhibit No. 2—(Contd.)

Commencing at a point on the northerly line of Sutter Street, distant thereon 107 feet 6 inches westerly from the westerly line of Grant Avenue, running thence westerly along said northerly line of Sutter Street 41 feet 6 inches; thence at a right angle northerly 126 feet to the southerly line of Harlan Place; thence at a right angle easterly along said southerly line of Harlan Place 41 feet 6 inches; thence at a right angle southerly 126 feet to the northerly line of Sutter Street and the point of commencement.

Being a portion of 50 Vara Lot Number 293.

That said three Trustees were said Margaret P. Gallois, the decedent, Jeanne Gallois Hill, said Executrix, and John E. Gallois, said Executor, the petitioner herein;

That said Trustees were also in possession of certain personal property, to-wit:

102 Shares of Common Stock of the Standard Oil Company of California; and 625 Shares of Common Stock of Raphael Weill & Company; [54]

and they held said real and personal property as trustees subject to the terms of a certain trust instrument dated August 9, 1924; that by the terms of said trust instrument the interest of said decedent in said real and personal property and the income therefrom was to terminate upon the occasion of and by reason of her death and upon the

## Petitioners' Exhibit No. 2—(Contd.)

termination of the interest or estate of said decedent in said property the same was to vest in accordance with the provisions of said trust agreement as applied to the facts found to exist at the time of decedent's death;

That it was provided in said trust instrument of date August 9, 1924, that if at the time of the death of said Margaret P. Gallois there had been paid to her by John Gallois, or on his account, on account of the indebtedness of said John E. Gallois to said decedent, for moneys advanced, sums of money sufficient so that the said decedent shall have been reimbursed to such extent that the amount unpaid on account of the indebtedness of said John Gallois to said decedent is less than the value of the assets of said trust estate, exclusive of any claim against said John Gallois as appraised at the time of her death, then 50% of the excess of the value of said trust estate over and above the amount of the unpaid indebtedness of said John Gallois to said decedent, shall go to and vest in said John Gallois, and the balance of said trust estate shall remain in said trust estate;

That prior to the death of said decedent said John Gallois paid to said decedent all sums of money laid out or expended for his account or benefit by said decedent, and all indebtednesses of the said John Gallois to said decedent from any cause whatsoever, and there was not at the time of the death of said decedent any sum of money or other indebtedness due, owing, unpaid or payable from

## Petitioners' Exhibit No. 2—(Contd.)

the said John Gallois to said decedent from any cause whatsoever; [55]

That in accordance with the terms of said trust agreement dated August 9, 1924, upon and by reason of the death of said Margaret P. Gallois, an undivided one-half interest in the real and personal property hereinabove mentioned and described as constituting the property of said trust estate, vested in said John Gallois personally, and the interest of said trust and the Trustees thereof, in said one-half of said trust estate terminated, and the remaining one-half of said trust fund shall continue in the possession of said Jeanne G. Hill and John E. Gallois, as surviving trustees of said trust, subject to the terms of said trust instrument of date August 9, 1924;

That at the date of said hearing of said petition on said May 9, 1941, the inheritance tax payable by said John Gallois by reason of the death of said decedent had not been fixed or paid; that by the order of said Court made on said 9th day of May, 1941, granting said petition, the signing of the formal order and decree granting said petition was withheld pending the fixing and payment of the inheritance taxes found to be payable by said John E. Gallois by reason of the death of said decedent;

That as appears from the receipt of the county treasurer of the City and County of San Francisco, State of California, on file herein, all inheritance taxes due to the State of California from all persons interested in the estate of said decedent

## Petitioners' Exhibit No. 2—(Contd.)

have been paid in full; and that therefor said order granting said petition, made by this Court on said 9th day of May, 1941, should now be signed:

It Is Therefore Ordered, Adjudged and Decreed that the said Margaret P. Gallois died on the 8th day of August, 1940; and that in accordance with the terms of said trust agreement dated August 9, 1924, upon and by reason of the death of said Margaret P. Gallois, an undivided one-half interest in the real and personal property hereinabove mentioned and described as constituting the property of said trust estate vested in said John Gallois personally, and the interest of said trust and the Trustees [56] thereof in said one-half of said property terminated;

And It Is Further Ordered, Adjudged and Decreed that the remaining one-half of said real and personal property belonging to said trust shall continue in the possession of said John E. Gallois and Jeanne G. Hill, as surviving trustees of said trust subject to the terms of said trust instrument of date August 9, 1924.

Done in open Court this 19th day of June, 1942.

T. I. FITZPATRICK

Judge of the Superior Court

Petitioners' Exhibit No. 2—(Contd.)

The annexed instrument is a correct copy of the original on file in my office.

Attest: Certified Sep. 22, 1944.

H. A. VAN DER ZEE,

Clerk

By H. BRUNNER

Deputy Clerk

[Endorsed]: Filed June 22, 1942.

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In the Superior Court of the State of California,  
in and for the City and County of San Francisco

No. 325 460

JOHN GALLOIS, sometimes known as John E. Gallois, and JEANNE GALLOIS HILL, sometimes known as Jeanne G. Hill, as surviving trustees of that certain inter vivos trust created by MARGARET P. GALLOIS, sometimes known as Margaret Gallois, during her lifetime, on or about August 9, 1924, and JOHN GALLOIS, sometimes known as John E. Gallois, and JEANNE GALLOIS HILL, sometimes known as Jeanne G. Hill, executor and executrix, respectively, of the last will and testament of said MARGARET P. GALLOIS, deceased.

Plaintiffs,

v.

JOHN GALLOIS, sometimes known as John E. Gallois, and JEANNE GALLOIS HILL, some-



Petitioners' Exhibit No. 2—(Contd.)

times known as Jeanne G. Hill, and MRS. CYNTHIA HILL POETT, MRS. MARGARET HILL HALEY and HORACE L. HILL, III, children of said Jeanne Gallois Hill, individually, and as representatives of the unknown, unascertained and/or unborn remaindermen, contingent and/or otherwise, under said trust above described, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE and TENTH DOE,

Defendants

DECREE SETTLING ACCOUNTS OF TRUSTEES OF AN INTER VIVOS TRUST, AUTHORIZING SALE OF REAL PROPERTY, INSTRUCTING TRUSTEES WITH RELATION TO THEIR POWER OF SALE AND ADJUDICATING INTERESTS IN PROPERTY OF THE TRUST

The above entitled action coming on duly and regularly [58] for trial this day, all parties agreeing in writing to said trial and waiving notice thereof, and the plaintiffs being represented by their attorney, Jerome Politzer, Esq., and John Gallois and Jeanne Gallois Hill, individually, having filed an Answer and appearing in person, and Mrs. Cynthia Hill Poett, Mrs. Margaret Hill Haley, and Horace L. Hill, III, by his guardian ad litem, Henry W. Poett, Jr., appearing and being

## Petitioners' Exhibit No. 2—(Contd.)

represented by their attorney, Herbert Chamberlin, Esq., and evidence oral and documentary having been introduced and considered by the court, and said trust instrument and said accounts mentioned in said complaint also having been introduced and considered by the court, and the respective parties hereto having waived in writing Findings of Fact and Conclusions of Law, and the fictitious defendants sued herein as First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, being dismissed, and it duly appearing that all of the above named defendants have appeared herein as representatives of the unknown, unascertained and/or unborn remaindermen and/or beneficiaries, contingent and/or otherwise, under the trust created by said Margaret P. Gallois during her lifetime on or about August 9, 1924 and fully represent said interests, and, the cause having been duly submitted for decision, and it duly appearing that all of the matters and things in said complaint are true and sustained by evidence duly introduced and considered, and that John Gallois, one of the above named parties was and is sometimes known and described as John E. Gallois, and that said Jeanne Gallois Hill, one of said parties above named was and is sometimes known and described as Jeanne G. Hill, and, also, known and described as Mrs. Horace L. Hill, Jr., and that said Margaret P. Gallois, the said trustor and decedent herein mentioned, was sometimes known as and described as Margaret Gallois, Marguerite Pissis [59] Gal-

## Petitioners' Exhibit No. 2—(Contd.)

lois and as Margaret Pissis Gallois; that said Margaret P. Gallois died on or about August 8, 1940, and that said John Gallois sometimes known as John E. Gallois and said Jeanne Gallois Hill, sometimes known as Jeanne G. Hill, are the duly appointed, qualified and acting executor and executrix, respectively, of the last will and testament of said Margaret P. Gallois, deceased; that on August 9, 1924 said Margaret P. Gallois executed unto Margaret P. Gallois, herself, and Emile M. Pissis and William H. Cook, a certain indenture of trust, a copy of which is attached to the complaint on file herein and marked Exhibit "A" and also attached to this Decree and marked Exhibit "A" and that said Margaret P. Gallois and Emile M. Pissis and William H. Cook entered upon their duties as such trustees on or about August 9, 1924; that as alleged in said complaint, said Emile M. Pissis and William H. Cook resigned as such trustees, and said John Gallois and said Jeanne Gallois Hill were duly substituted in their place and stead as trustees, and that after the death of said Margaret P. Gallois, said John Gallois and said Jeanne Gallois Hill became and are now the duly appointed, qualified and acting surviving trustees of said trust; that upon the death of said Margaret P. Gallois on or about August 8, 1940, said Jeanne Gallois Hill, sometimes known as Jeanne G. Hill, became the life beneficiary of said trust; that Henry W. Poett, Jr., is the duly appointed, qualified and acting guardian ad litem of said defendant, Horace L. Hill, III, one of the defendants in this action,

## Petitioners' Exhibit No. 2—(Contd.)

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that said Margaret P. Gallois in her lifetime and on the 9th day of August, 1924, executed unto Margaret P. Gallois, herself, and to Emile M. Pissis and William H. Cook, a certain indenture of trust, a copy of which said indenture of trust is attached hereto and marked Exhibit "A" and by reference thereto is [60] made a part of this decree as fully as though said indenture of trust was spread out at large herein; and that said Margaret P. Gallois, Emile M. Pissis and William H. Cook, the grantees and trustees named in said indenture of trust, accepted the obligation of said trust as such trustees and on or about the 9th day of August, 1924, entered upon their duties as such trustees; and that thereafter upon settlement of their accounts, said Emile M. Pissis and William H. Cook resigned as such trustees and in their places said John Gallois and said Jeanne Gallois Hill, plaintiffs herein, were named as trustees of said trust to act with said Margaret P. Gallois and that after the death of said Margaret P. Gallois on August 8, 1940, said John Gallois and Jeanne Gallois Hill, plaintiffs herein, became and are now the duly appointed, qualified and acting surviving trustees of said trust and that the accounts of said Margaret P. Gallois, William H. Cook and Emile M. Pissis, as trustees of said trusts, filed on August 20, 1928, before the resignation of said William H. Cook and Emile M. Pissis, were duly settled, approved and allowed by the above entitled court in



## Petitioners' Exhibit No. 2—(Contd.)

that certain proceeding pending therein entitled In the Matter of the Trust Estate Created for Margaret P. Gallois and numbered in the records of said Superior Court 198,774;

It Is Further Oredred, Adjudged and Decreed, that said John Gallois, sometimes known and described as John E. Gallois, and Jeanne Gallois Hill, sometimes known and described as Jeanne Gallois Hill, plaintiffs herein, were and are also the duly appointed, qualified and acting executor and executrix, respectively, of the last will and testament of said Margaret P. Gallois, deceased;

It Is Further Ordered, Adjudged and Decreed, that the second and final account of Margaret P. Gallois, deceased, presented [61] by John Gallois and Jeanne Gallois Hill, executor and executrix of the last will of Margaret P. Gallois, deceased, and the First Account of John Gallois and Jeanne Gallois Hill, as trustees of the trust created for Margaret P. Gallois, copies of which are attached to the complaint on file herein and marked Exhibit "B" and the supplemental income account of said John Gallois and Jeanne Gallois Hill, attached to said complaint and marked Exhibit "C", be and the same are hereby adjudged true and correct and are supported by due and proper vouchers and said accounts and all of them are hereby settled, allowed and approved as presented and filed and that said surviving trustees, John Gallois and Jeanne Gallois Hill, on the settlement of said accounts have in their hands, as such trustees, the following amounts of money:



Petitioners' Exhibit No. 2—(Contd.)

\$178.45 on account of principal or corpus of the trust

\$499.37 on account of income of said trust

It Is Further Ordered, Adjudged and Decreed, that the corpus or principal of said trust, in the possession of said surviving trustees, in addition to said sum of \$178.45 above set out, is as follows, to wit:

An undivided 1/2 part of the following real and personal property:

102 Shares of Standard Oil Company of California

625 Shares of Raphael Weil & Company

All that certain piece, parcel or lot of land, situate, lying and being in the City and County of San Francisco, State of California, and more particularly described as follows, to wit:

Commencing at a point on the northerly line of Sutter Street, distant thereon 107 feet 6 inches westerly from the westerly line of Grant Avenue, running thence westerly along said northerly line of Sutter Street 41 feet 6 inches; thence at a right angle northerly 126 feet to the southerly line of Harlan Place; thence at a right angle easterly along said southerly line of Harlan Place 41 feet 6 inches; thence at a right angle southerly [62] 126 feet to the northerly line of Sutter Street and the point of commencement.

Being Portion of 50 Vara Lot Numbered 293.

It Is Further Ordered, Adjudged and Decreed,

## Petitioners' Exhibit No. 2—(Contd.)

that said John Gallois, one of the defendants in this action, is the owner in his own right, free from all claims of the trust, of the remaining undivided one-half of said real and personal property more particularly described in the foregoing paragraph in which said trust owns the other undivided one-half part or share;

It Is Further Ordered, Adjudged and Decreed, that at this time the court is making no allowance of fees or commissions for said trustees, John Gallois and Jeanne Gallois Hill, but is allowing and directing said trustees to pay the following fees, as fees for the attorney of said trustees, to wit:

Unto Jerome Politzer, Esq., attorney for said trustees the sum of .....\$750

together with all expenses incurred in connection with the preparation and filing of said accounts and all costs of suit herein incurred, all of which sums may be paid out, by said trustees, of either the income or principal of said trusts;

It Is Further Ordered, Adjudged and Decreed, that upon the death of said Margaret P. Gallois, on the 8th day of August, 1940, said Jeanne Gallois Hill became and is now the life beneficiary of said trust and is entitled to the net income thereof for and during her lifetime, in accordance with the terms of said trust and that since the death of said Margaret P. Gallois all of said net income from the proportion of the properties namely one-half thereof owned by said trust has been duly paid unto said Jeanne Gallois Hill and all of [63] the in-

## Petitioners' Exhibit No. 2—(Contd.)

come from the proportion of the properties owned by said John Gallois personally have been duly paid to said John Gallois;

It Is Further Ordered, Adjudged and Decreed that the presently known contingent beneficiaries of said trust to take after the death of said Jeanne Gallois Hill are the presently living children of said Jeanne Gallois Hill, to wit:

Mrs. Cynthia Hill Poett,

Hillsborough, San Mateo County, California

Mrs. Margaret Hill Haley,

Horace L. Hill, III.,

that the possible contingent beneficiaries other than the presently known children of said Jeanne Gallois Hill are mentioned and provided for by Paragraph Fifth of said indenture of trust, a copy of which is attached to this decree and marked Exhibit "A", but the court withholds for the time being determination as to all contingent beneficiaries until the death of said Jeanne Gallois Hill, when said provision of said trust shall come into force and effect, excepting that the presently known contingent beneficiaries are the said three children of Jeanne Gallois Hill and said John Gallois, one of the defendants herein;

It Is Further Ordered, Adjudged and Decreed, that said surviving trustees of said trust may, and they are hereby instructed that they are so authorized, to sell the undivided one-half part of that certain real property hereinatfer described with said John Gallois the owner of the other undivided one-

## Petitioners' Exhibit No. 2—(Contd.)

half thereof to Kernan Robson, or any other purchaser or nominee for the sum of \$70,000.00 for both interests of said trust and of said John Gallois in said real property, the said surviving [64] trustees being entitled to one half of the net purchase price, after all deductions on account of expenses of sale, taxes, and other charges including the real estate commission payable to Louis T. Samuels, amounting to \$2250.00, as prayed in said complaint on file herein;

That the said real property, which said surviving trustees are authorized to sell, as aforesaid, is an undivided one-half part of all that real property situate, lying and being in the City and County of San Francisco, State of California, more particularly described as follows:

Commencing at a point on the northerly line of Sutter Street, distant thereon 107 feet 6 inches westerly from the westerly line of Grant Avenue, running thence westerly along said northerly line of Sutter Street 41 feet 6 inches; thence at a right angle northerly 126 feet to the southerly line of Harlan Place; thence at a right angle easterly along said southerly line of Harlan Place 41 feet 6 inches; thence at a right angle southerly 126 feet to the northerly line of Sutter Street and the point of commencement.

Being Portion of 50 Vara Lot Numbered 293.

It Is Further Ordered, Adjudged and Decreed that under the terms of said trust, Paragraph Sixth



## Petitioners' Exhibit No. 2—(Contd.)

thereof, the said surviving trustees of said trust, plaintiffs herein, their survivors, successors and/or substitutes, possess full power and authority to sell any and/or all of the properties and/or assets making up the corpus or principal of said trust including the said undivided one-half interest of said trust in said real property hereinbefore described as located on the North Side of Sutter Street, San Francisco, California, at any time or times and upon terms or conditions as may seem reasonable and advisable to said trustees and for the best interests of said trust and of the beneficiaries thereof without the necessity of applying to this or any court for authority so to do or for confirmation of any such action on their part; [65]

It Is Further Ordered, Adjudged and Decreed, that the named defendants represent any possible beneficiaries not in being or not personally acting herein and that the interests of said named defendants are not in conflict in anywise with any beneficiary not in being or not named and that the named beneficiaries, defendants herein, will not acquire any advantage over any person or persons or beneficiaries not in being or not named herein and that the named defendants and beneficiaries are fair persons to represent any and all persons who might at any time in anywise participate in any of the property of said trusts and that they are proper representatives of said persons:

It Is Further Ordered, Adjudged and Decreed, that all the named defendants have been duly and



## Petitioners' Exhibit No. 2—(Contd.)

regularly served with process herein, to wit: with a copy of the Summons issued in said action attached to a copy of the complaint in said action and that this court has jurisdiction over all persons and parties named in said action or interested therein.

It Is Further Ordered, Adjudged and Decreed, that there be allowed and the trustees are directed to pay the sum of \$100.00 as and for a fee to Herbert Chamberlin, Esq., attorney for the defendants represented by him herein, together with all expenses incurred by him in connection with the preparation and filing of the answer of the guardian ad litem and the other defendants herein and all other costs of suit incurred herein, all of which said sums may be paid out by said trustees of either the income or principal of said trust.

Done in Open Court this 3rd day of February, 1944.

THOS. W. FOLEY

Judge of the Superior Court

The annexed instrument is a correct copy of the original on file in my office.

Attest: Certified Feb. 3, 1944.

H. A. VAN DER ZEE,

Clerk

By H. BRUNNER,

Deputy Clerk

[Endorsed]: Filed Feb. 3, 1944.

Petitioner's Exhibit No. 2—(Contd.)

21.60 Plus Tax

Original duplicate

Return to Percy E Towne 407 deYoung Bldg.  
San Francisco

This Agreement, made and entered into this 9th day of August, 1924, by and between Margaret P. Gallois, widow, hereinafter called the first party, and Margaret P. Gallois, and Emile M. Pissis and William H. Cook as the second parties, hereinafter called the Trustees,

Witnesseth:

That the said first party has granted, assigned and transferred and by these presents does grant, assign and transfer unto the Trustees all her right, title and interest in the real and personal property set forth and described in the schedule hereunto annexed, marked Exhibit "A" and made a part hereof.

And in order to avoid the recording of this instrument, it is understood and agreed that the said Margaret P. Gallois shall and she hereby agrees to make, execute and deliver to said Trustees a grant of the real property described in said schedule subject, however, to all existing encumbrances, and said real property shall form a part of the trust fund hereby created and such grant and said real property shall be deemed accepted by the Trustees and the title thereto, as well as the title to the personal property described in said schedule, shall be deemed held in trust by said Trustees for the following uses and purposes and upon the following terms and conditions, namely:—

## Petitioner's Exhibit No. 2—(Contd.)

First: To receive the income, revenues and profits of the property held and to be held subject to the trust hereby created, and to apply the same as follows:

(a) To the payment of the interest due or to become due on the obligations of the first party which are now or may be hereafter secured by liens on the property described in said schedule, whether such liens be evidenced by mortgage, deed [67] of trust, pledge or otherwise.

(b) To the payment of taxes, assessments, insurance, repairs and all other fixed charges required for the proper preservation, maintenance and upkeep of said property, including commissions, brokerage and any other expense of sale, transfer or other disposition of said properties for the benefit of said trust estate, including the expense of renewal of any existing loans secured by such liens.

(c) After the payment of the charges hereinbefore mentioned, to pay to said Margaret P. Gallois any income or profits still remaining in the hands of said Trustees, which payments to her shall be made monthly, quarterly or semi-annually, as may be most convenient in the handling of said trust fund, having regard to the extent and character of the gross income, the payments to be made therefrom, the time of the receipt of said income by said Trustees, and the time when such preferred charges must be paid in the ordinary course.

Second: The Trustees are likewise authorized and directed to apply to the maintenance and sup-

## Petitioner's Exhibit No. 2—(Contd.)

port of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund;

Third: Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving Trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, [68] shall be paid by said surviving Trustees to said Jeanne G. Hill.

Fourth: Upon the death of said Margaret P. Gallois if Jeanne G. Hill is still living she shall become one of the Trustees of the fund hereby created in the place and stead of said Margaret P. Gallois, and shall have the same powers as Trustee and shall be subject to the same obligations and duties in that capacity; and any title or interest in said property which the said Margaret P. Gallois had as Trustee by virtue of this agreement, or any conveyance made by her to said Trustees, shall go to and vest in the said Jeanne G. Hill as Trustee in the place and stead of said Margaret P. Gallois, and the surviving Trustees are authorized, empowered and directed to make any conveyance to the said Jeanne G. Hill as Trustee which may be necessary or proper to vest such title in her as one of such Trustees.

Fifth: Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands



## Petitioner's Exhibit No. 2—(Contd.)

of said surviving Trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and [69] her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust fund shall vest in said Margaret P. Gallois.

Sixth: As incidental to said trust, the Trustee shall have the power to sell, transfer or convey the property or any part thereof held subject to the trust hereby created; to collect at the maturity thereof any of the securities constituting all or a part of the said property, and to invest and reinvest the proceeds of such sales and the moneys so collected, in such property as is legal and author-



## Petitioner's Exhibit No. 2—(Contd.)

ized for investment in accordance with the laws of the State of California relative to investment or loan of funds deposited with Savings Banks; and to exchange the trust property or any part thereof. The property in which such proceeds and moneys may be invested and the property received on such exchange shall be held subject to the said trust, and may likewise be sold or exchanged as often as the Trustees shall see fit, and the proceeds of any such sale or sales invested as before. The Trustees shall also have the power to settle, compromise or pay in full any existing indebtedness of the first party which may constitute a lien or charge upon any of the property described in said schedule. The enumeration herein of the powers of the Trustees shall not be considered to be limitations upon their powers, but the Trustees shall have the power at the expense of the trust estate to do all other things which may be legally done by Trustees for the proper care, control, preservation, management or disposition of the property held subject to the trust hereby created.

Seventh: Neither the said Margaret P. Gallois nor any Trustee appointed to succeed her shall be entitled to compensation for services rendered as Trustee, but the other Trustees herein named shall be entitled to a reasonable compensation for their services rendered under this agreement and shall have a lien upon the property held subject to this trust for such compensation and for reasonable expenses, costs and charges necessarily incurred [70] and actually paid by said Trustees in relation to

## Petitioner's Exhibit No. 2—(Contd.)

this agreement, and such payments may be deducted by the Trustees from the trust fund if the income or profits be insufficient to pay the same.

Eighth: Said Trustees assume no responsibility for any act or thing in relation to this agreement, except their own misconduct or neglect.

Ninth: Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois,

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty (50%) per cent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid

## Petitioner's Exhibit No. 2—(Contd.)

outlays made by her on behalf of John Gallois still exceeds the then value of the trust fund in the hands of said Trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore pro- [71] vided, but said John Gallois shall not at any time be deemed indebted to said Trustees or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.

In Witness Whereof the parties hereto have caused this agreement to be executed in duplicate the day and year first hereinabove written.

MARGARET P. GALLOIS

EMILE M. PISSIS

W. H. COOK [72]

EXHIBIT "A"

REAL ESTATE

## Parcel 1.

Commencing at a point on the northerly line of Sutter Street distant thereon westerly 107 feet 6

## Petitioner's Exhibit No. 2—(Contd.)

inches from the westerly line of Grant Avenue; running thence westerly along the northerly line of Sutter Street 41 feet 6 inches; thence at right angles northerly 126 feet to the southerly line of Harlan Place; thence at right angles easterly along the southerly line of Harlan Place 41 feet 6 inches and thence at right angles southerly 126 feet to the point of commencement.

## Parcel 2.

Commencing at a point on the southerly line of California Street distant thereon westerly 134 feet from the westerly line of Van Ness Avenue; running thence westerly along the southerly line of California Street 44 feet 3 inches; thence at right angles southerly 137 feet 6 inches; thence at right angles easterly 44 feet 3 inches, and thence at right angles northerly 137 feet 6 inches to the point of commencement.

[Printer's note]: In pencil 99,00 and Sale of prop.

Both Parcels above described are subject to lien created by mortgage or Deed of Trust, given to secure an indebtedness of One Hundred Twenty-Three Thousand (\$123,000.00) Dollars evidenced by promissory notes made by Margaret P. Gallois, payable to The French American Bank of San Francisco.

[Printer's note]: In pencil 63,000 pd. to M.



Petitioner's Exhibit No. 2—(Contd.)

## PERSONAL PROPERTY

1500 Shares of the capital stock of Raphael Weill & Co., Inc., evidenced by Certificates as follows:

No. 1062 for 500 shares

No. 1165 for 1000 shares

Both Certificates pledged to The French American Bank of San Francisco to secure a loan of Seventy-five Thousand (\$75,000.00) Dollars.

Claim against John Gallois for moneys laid out and expended on his account by Margaret P. Gallois aggregating \$———, evidenced by a written acknowledgment of such indebtedness. [73]

S-34489

## ORDER

John Gallois as Ex. & Tr.

John E. “ alias

Jeanne G. Hill as Exc. & Tr.

Mrs. Cynthia H. Poett

Mrs. Margaret H. Haley

Horace L. Hill III

Margaret P. Gallois Decd

Margaret “ alias

Marguerite P. “ alias

To

Kernan Robson

Recorded at Request of Attorney at 29 Min. Past  
2 P. M. Feb 3-1944 4045 Official Records, p. 372.  
City and County of San Francisco, California.

[Seal]

THOS. A. TOOMEY,

Recorder [74]



Petitioner's Exhibit No. 2—(Contd.)

In the Superior Court of the State of California,  
in and for the City and County of San Francisco.

198793

In the Matter of the Trust Estate  
Created for

MARGARET P. GALLOIS.

DECREE OF SETTLEMENT OF ACCOUNT  
OF TRUSTEES ACCEPTANCE OF RES-  
IGNATIONS OF W. H. COOK AND EMILE  
A. PISSIS, AS TRUSTEES, AND DIS-  
CHARGE.

W. H. Cook, as Trustee of the above entitled Trust, having heretofore filed an accounting of moneys received and disbursed by the Trustees from the beginning of the administration of said Trust to the 20th day of August, 1928, together with a petition for the settlement of said account and for the acceptance of his written resignation as such Trustee, filed with said account and petition, and Margaret P. Gallois and Emile A. Pissis, the other two Trustees of said Trust, having also filed a similar petition presenting an account identical with that presented by the said W. H. Cook, and praying for the settlement of said account and the acceptance of the resignation of said Emile A. Pissis as Trustee, filed with said account and petition; and

Said accounts, petitions and resignations having come regularly on for hearing before the above

## Petitioner's Exhibit No. 2—(Contd.)

entitled court, in Department No. 14 thereof, on Wednesday, the 31st day of October, 1928, at the hour of two o'clock in the afternoon on said day, and said Margaret P. Gallois and Emile A. Pissis being represented in court by Jerome Politzer, Esq., their attorney, and said W. H. Cook being represented by Percy E. Towne, Esq., his attorney, and Jeanne Gallois Hill individually, and as Guardian ad litem for her [75] minor children, Cynthia Hill, Margaret G. Hill and Horace A. Hill, III., being represented by Platt Kent, Esq., her attorney, and John Gallois being also represented by said Jerome Politzer, Esq., said matter was taken up to be heard, and from the testimony taken and all the papers, records and files herein, the Court being duly advised in the premises finds:—

That notice of the hearing of this matter has been given to all parties in interest in the manner and form and for the period prescribed by law and the order of this Court, and all parties in interest are represented by counsel at this hearing.

The Court further finds:—

That at the time of the filing of said petitions, all of the allegations and recitals thereof were true and the same are now true except that since the filing of said petitions said Trustees have secured from said John Gallois a promissory note evidencing the obligation of said John Gallois to said Margaret P. Gallois, mentioned and described in said trust instrument, to-wit: The sum of \$251,-

## Petitioner's Exhibit No. 2—(Contd.)

The Court further finds:—

That at this time said trust estate consists of certain real and personal property set forth and described in Exhibit “A” annexed herto and made a part of this decree.

The Court further finds:—

That said Trustees who have filed their resignations herein have persuaded trustworthy successors to petition for appointment as Trustees, to-wit: Jeanne Gallois Hill and John Gallois, and said account should be settled and the resignations of said petitioners, W. H. Cook and Emile A. Pissis, should be accepted and said resigning Trustees should be discharged of [76] further obligation concerning said trust and their trusteeship upon the appointment of their successors and the filing of a receipt by the new Trustees acknowledging the possession of the property constituting the corpus of said trust fund; and

No person having made any objection to the settlement of said account or the granting of said petition or acceptance of said resignations, and all persons in interest having consented thereto,

It Is Ordered that said account as presented by said Trustees be and the same is hereby settled, allowed and approved as rendered.

It Is Adjudged and Decreed that the trust estate of the above entitled trust consists solely of that certain real and personal property set forth and described in said Exhibit “A” annexed hereto and made a part of this decree.

## Petitioner's Exhibit No. 2—(Contd.)

It Is Ordered, Adjudged and Decreed that the resignations of said W. H. Cook and Emile A. Pissis, as Trustees in the above entitled matter, be and the same are hereby accepted, and said W. H. Cook and Emile A. Pissis shall be deemed discharged of all further obligation or responsibility as Trustees herein upon the appointment of their successors as Trustees and the filing of a written receipt executed by said new Trustees acknowledging the receipt from said retiring Trustees of the property constituting said trust fund as set forth and described in said Exhibit "A" annexed hereto.

7th November

Done in open Court this ~~31st~~ day of ~~October~~,  
1928.

WALTER PERRY JOHNSTON  
Judge. [77]

## EXHIBIT "A"

## Item I.

All that certain real property situate in the City and County of San Francisco, State of California, and particularly described as follows:

Commencing at a point on the northerly line of Sutter Street, distant thereon westerly 107 feet 6 inches from the westerly line of Grant Avenue; running thence westerly along the northerly line of Sutter Street 41 feet 6 inches; thence at right angles northerly 126 feet to the southerly line of Harlan Place; thence at right angles easterly along the southerly line of Harlan Place 41 feet 6 inches,

Petitioner's Exhibit No. 2—(Contd.)

and thence at right angles southerly 126 feet to the point of commencement.

Subject to the lien of a Deed of Trust given to secure a promissory note in favor of the United Bank and Trust Company, of San Francisco, on which the balance of principal is \$99,000.00.

Item II.

Promissory Note of John Gallois dated October 30, 1928, for the sum of \$251,000.00, payable to Margaret P. Gallois, W. H. Cook and Emile A. Pissis one day after date thereof with interest at 6% per annum from maturity.

The Annexed Instrument is a Correct Copy of the Original on file in my office.

Attest: Certified Sep 22, 1944.

H. A. VAN DER ZEE,

County Clerk

By H. BRUNNER

Deputy [78]

[Endorsed]: Filed Nov. 13, 1928.



Petitioner's Exhibit No. 2—(Contd.)

In the Superior Court of the State of California, in  
and for the City and County of San Francisco.

In the Matter of the Trust Estate

Created for

MARGARET P. GALLOIS

### ORDER APPOINTING TRUSTEES

The verified petitions of Margaret P. Gallois, Emile M. Pissis and W. H. Cook, trustees, in the above entitled matter praying for the appointment of successor trustees to W. H. Cook and Emile M. Pissis of the trusts created for Margaret P. Gallois referred to in said petition, dated August , 1924, executed and delivered by said Margaret P. Gallois to herself, said Emile M. Pissis and W. H. Cook, to fill the vacancies caused by the resignation of said Emile H. Pissis and W. H. Cook, coming on regularly to be heard before the above entitled Superior Court on this 7th day of November, 1928, and it appearing from the evidence introduced on the said hearing that the said Emile M. Pissis and W. H. Cook resigned as trustees of the said trusts on August 15th, 1928, and that because of the resignation of said Emile M. Pissis and W. H. Cook as such trustees it is necessary that trustees of the trust created by the said declaration of trust be appointed to fill the vacancies caused by the resignations aforesaid, and that all the beneficiaries of the trusts under the said declaration of trust now living, namely, Margaret P. Gallois, Jeanne Gallois Hill, John Gallois and Jeanne Gallois Hill as the

## Petitioner's Exhibit No. 2—(Contd.)

guardian ad [79] litem of her minor children, Cynthia Hill, Margaret G. Hill and Horace L. Hill, III, have requested that said Jeanne Gallois Hill be appointed in the place and stead of said W. H. Cook, and that said John Gallois be appointed in the place and stead of Emile M. Pissis, as trustees under the said declaration of trust, and that the said Jeanne Gallois Hill and John Gallois are suitable persons to be appointed trustees of the said trust and that all the allegations of the said petitions with respect to the appointment of the said trustees are true:

Now, Therefore, It Is Hereby Ordered that the said Jeanne Gallois Hill and the said John Gallois be and they hereby are appointed trustees of the trusts under the said declaration of trust, and that the said Jeanne Gallois Hill and the said John Gallois be and they are hereby directed to enter upon the discharge of the duties of trustees under the said declaration of trust, and to exercise all the rights, privileges and authorities vested in the said Jeanne Gallois Hill and said John Gallois as such trustees under the said declaration of trust, and to be subject to all the liabilities and responsibilities arising therefrom.

Done in open Court this 7th day of November, 1928.

WALTER PERRY JOHNSON  
Presiding Judge of the Su-  
perior Court.

[Endorsed]: Filed Nov. 13, 1928.

Petitioner's Exhibit No. 2—(Contd.)

State of California

City and County of San Francisco—ss.

I, H. I. Mulcrevy County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court, in and for said City and County.

Hereby Certify, the foregoing to be a full, true and correct Copy of the Original Order Appointing Trustee in the above entitled cause, filed in my office on the 13th day of November A. D. 1928.

Attest my hand and Seal of said Court this 13th day of November A. D. 1928.

[Seal]

H. I. MULCREVY

Clerk

By H. BRUNNER

Deputy Clerk [80]

No. 198773—Dept. 14

Superior Court

State of California

City and County of San Francisco

In the Matter of the Trust Estate Created for

MARGARET P. GALLOIS

ORDER APPOINTING TRUSTEES

CERTIFIED COPY

[Endorsed]: Filed Nov. 13, 1928.

## PETITIONER'S EXHIBIT No. 3

(Copy)

Meeting of the Board of Trustees of the Margaret P. Gallois Trust, held in the office of Platt Kent, Monday, October 28, 1929.

Present: Mrs. Margaret P. Gallois, Mrs. Jeanne Gallois Hill, Mr. John Gallois.

Mr. Platt Kent acted as Secretary.

It was unanimously resolved that a letter be addressed to Messrs. Russell, Miller & Co. authorizing this firm to call the trust funds which are at present on the call money market and directing them to issue a check in favor of the Trustees.

It was also unanimously agreed that for the time being the money obtained in closing out the account at Russell, Miller & Company shall be invested in a Certificate of Deposit pending further developments in the stock market.

The Trustees also agreed to honor an assignment made by Mr. John Gallois of his beneficial interest in the Trust in favor of Messrs. Russell, Miller & Company in an amount not exceeding \$15,000. In the event Mr. John Gallois should become entitled to any disbursement from said Trust he will submit documentary evidence of the liquidation of his obligation with Russell Miller before this assignment will be considered null and void.

There being no further business to be transacted the meeting adjourned.

Secretary:

(Signed) PLATT KENT

Approved:

(Signed) MARGARET P. GALLOIS

(Signed) JOHN GALLOIS

(Signed) JEANNE GALLOIS HILL [82]

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## MINUTES OF MEETING OF TRUSTEES OF THE MARGARET P. GALLOIS TRUST

A meeting of the trustees under the Margaret P. Gallois Trust was held at the office of Platt Kent, 114 Sansome Street, San Francisco, on Wednesday, the 19th of June, 1929, at 3:00 P.M.

There were present at the meeting Margaret P. Gallois, John Gallois and Jeanne Gallois Hill.

Mrs. Margaret P. Gallois was unanimously elected Chairman of the Board of Trustees and thereafter presided at the meeting.

Mr. Platt Kent was unanimously appointed Secretary of the Board until further notice and thereafter acted as Secretary of the meeting.

The action of the Board in paying off the mortgage held by the United Bank and Trust Company, French American Branch, now the Bank of America of California, was ratified and approved.

The action of the Board in appointing Madison & Burke, real estate and insurance agents, as Manager for the building located at 326, etc Sutter



Street, and directing that this firm pay any proceeds derived from the operation of said building monthly to Mrs. Margaret P. Gallois was also ratified and confirmed.

The Secretary was directed to write Madison & Burke a letter advising them as to the confirmation of their appointment and directing them to collect all income to be derived from said property from rents and other sources and from said income to make disbursements of all expenses necessarily incurred in the maintenance and operation of said building, with the exception of taxes, and directing further that the commission to be paid said Madison & Burke for taking such action should be the sum of \$7.00 per month, together with such commissions as the said firm might from time to time earn in renting any portion of the premises, such commissions to be fixed on the basis prescribed by the San Francisco Real Estate Board, the net proceeds after the expenses above referred to to be paid to Mrs. Margaret P. Gallois as heretofore.

The Secretary was also directed to write Mr. W. H. Cook of the White House requesting him to forward to the Secretary tax bills on said building and real property which he may from time to time pay for account of the Trust.

The Trustees authorized the payment of the sum of \$5,079.97 to Mrs. Margaret P. Gallois, being the interest earned on the sum of money deposited in the name of the Trustees with Russell, Miller & Co., brokers, of this city, from November 9, 1928, to and including May 8, 1929. [83]

The Crocker First National Bank was named as depositary and the Trustees authorized a deposit of \$5,000 with said bank as a fund to be used for general expenses of the trust, said sum to be drawn upon by checks signed by any two of the Trustees.

The Crocker First Federal Trust Company was appointed depositary of such securities as might be purchased for account of the trust, said securities to be deposited with said Trust Company with instructions to cut the coupons on such bonds as may be deposited and pay the proceeds thereof to Margaret P. Gallois as such coupons mature from time to time. Such securities are to be withdrawn from said Trust Company only upon the written consent of all the Trustees.

No further business coming before the meeting, said meeting adjourned.

(Signed) PLATT KENT

Secretary

We the undersigned do hereby approve the foregoing and certify that it is a true and correct statement of the proceedings had at the meeting referred to.

(Signed) JOHN GALLOIS

Trustee

(Signed) MRS. E. GALLOIS

(Signed) (Margaret P. Gallois)

Trustee

(Signed) JEANNE GALLOIS HILL

Trustee

[Endorsed]: T.C.U.S. Filed Sept. 22, 1944. [84]

[Title of Tax Court and Cause.]

Docket No. 3507

Promulgated February 27, 1945

Where decedent created a trust naming herself as one of three trustees, reserving a life estate in the income and providing that in case of any deficiency in such income, the trustees should apply to her maintenance and support any part of the trust corpus which, in their opinion, might be necessary for such purpose, Held, the value of the trust corpus is includible in the decedent's gross estate under section 811 (c), I.R.C., as a transfer intended to take effect in possession or enjoyment at or after death. *Blunt v. Kelly*, 131 Fed. (2d) 632, followed.

John V. Lewis, Esq.,  
Clyde C. Sherwood, Esq., and  
Jerome Politzer, Esq.,  
for the petitioners.

T. M. Mather, Esq.,  
for the respondent.

The respondent determined a deficiency in estate tax against the Estate of Margaret P. Gallois in the amount of \$19,323.36.

The single issue in controversy is whether the entire value at the date of death of the corpus of a trust created by her on August 9, 1924, is includible in the decedent's gross estate under the provisions of section 811 (c) of the Internal Revenue Code. Another issue raised by [85] the pleadings has been abandoned by the petitioners.

## FINDINGS OF FACT

Margaret P. Gallois, hereinafter called the decedent, was born March 17, 1856, and died testate on August 8, 1940, a resident of the city and county of San Francisco, California. The petitioners, John E. Gallois and Jeanne G. Hill, are the duly qualified and acting executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the collector of internal revenue for the first district of California.

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of \$251,000 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill. Therefore, on August 9, 1924, she executed a trust, naming herself, Emile M. Pissis and William H. Cook as trustees.

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent.

Other material provisions of the trust are as follows:



Second: The Trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which [86] may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund.

Third: Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving Trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving Trustees to said Jeanne G. Hill.

\* \* \* \* \*

Fifth: Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving Trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said



Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois.

\* \* \* \* \*

Ninth: Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois.

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by [87] John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty (50%) per cent of the excess of the value of

said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of the trust fund in the hands of said Trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.

The decedent retained no power to alter, amend or revoke the trust.

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had 2 children, John aged 38, and Jeanne aged 36, and 3 grandchildren of the ages of 7, 5 and 1, respectively, all being the children of Jeanne. She left surviving her at her death her 2

children, 3 grandchildren, and 3 great grandchildren, Harry Poett III, aged 1 year and 8 months, Carolan Poett, aged 5 months, and Louise Haley, aged 5 months.

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about 2 years later.

Decedent's daughter, Jeanne, was married to Horace Hill, Jr., who [88] had been well off, but who, in the period from 1924 to 1928, was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about \$42,000.

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of \$251,000, to the trustees.

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G.

Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness.

On June 19, 1942, the Superior Court of the state of California in and for the city and county of San Francisco, entered a "Decree Terminating Life Estate, etc." in which it was adjudged that "upon and by reason of the death of said Margaret P. Gallois, an undivided one-half interest in the real and personal property hereinabove mentioned and described as constituting the property of said trust estate, vested in said John Gallois personally, and the interest of said trust [89] and the Trustees thereof, in said one-half of said trust estate terminated."

### OPINION

Van Fossan, Judge:

The issue for our determination is whether or not the corpus of the trust created by the decedent on August 9, 1924, is includible in her gross estate under the provisions of section 811 (c) of the Internal Revenue Code. The section is set forth in the margin.<sup>1</sup>

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<sup>1</sup>Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \* \* \*

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation



The petitioners contend that no part of the trust is includible in the decedent's gross estate under section 811 (c), but that it is squarely within the provisions of that section excepting "a bona fide sale for an adequate and full consideration in money or money's worth." They premise their argument on the following:

By December, 1927, the statute of limitations had run on John Gallios' indebtedness to the decedent and he was under no legal obligation to pay any part thereof; furthermore, prior to the payments by him, the trust properties had no value since they were encumbered to an extent in excess of their fair market value. Therefore, conclude the petitioners, the payment by John Gallois, which he was not legally obligated to make, and which gave value to

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of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter. [90]



the trust properties, constituted the payment of a full and adequate consideration for a one-half interest in the trust, and brings the case within the exception provided in section 811 (c).

We are not impressed by this contention. Although the statute of limitations may have run on the indebtedness so as effectively to bar an action by the decedent for its payment, there can be no doubt that the obligation itself remained. The statute of limitations merely bars the remedy of the creditor but does not totally discharge the right. Williston on Contracts, Vol. 6, Section 2002. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225. John Gallois admitted that he recognized his moral obligation to his mother and the testimony indicates that both he and the decedent considered his payments as a discharge of this obligation. It is clear, we think, that the payments constituted the satisfaction of this debt and not a sale and that the petitioners' contention cannot be sustained.

We turn, therefore, to a consideration of the other provisions of section 811 (c). It should be noted at the outset that, since the trust was created prior to the joint resolution of March 3, 1931, the corpus [91] is not taxable solely because of the fact that the decedent reserved to herself the trust income during her life, *Hassett v. Welch*, 303 U. S. 303; *May v. Heiner*, 281 U. S. 238; *Estate of Ed-*

ward E. Bradley, 1 T. C. 518, and the respondent does not contend otherwise.

The respondent contends that the corpus of the trust must be included in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death, since the trust instrument provided that the corpus might be invaded for the benefit of the settlor, and hence it could not be determined until that time whether any of the trust would pass to the named remaindermen.

We think this contention must be sustained. Under the terms of the trust, the trustees were authorized and directed to apply to the maintenance and support of the decedent any part of the trust corpus which, at any time, might be necessary, in their opinion, for her maintenance and support, because of any deficiency in the trust income.

The case at bar in this respect is substantially the same as that of *Blunt v. Kelly*, 131 Fed. (2d) 632. There the decedent created a trust providing in part that should, in their opinion, the necessity arise, the trustees were empowered to use such portion of the principal of the trust fund as might seem proper for the support, care or benefit of the settlor. The decedent was not a trustee but one of the trustees was her son, who was also a remainderman under the trust.

It was argued that, since one of the trustees was a remainderman and therefore had an interest adverse to that of the settlor with respect to the principal, she thereby effectively terminated her interest therein. In answer, the Court said: [92]

\* \* \* It is true that under this provision the trustees, one of whom held an adverse interest, were required to form an opinion as to the existence of any such necessity, but in so doing the trustees were not making a free and uncontrolled decision. They were of course bound to form their opinion on the existence of any such necessity in good faith and were subject to the control of the equity courts if they failed to do so. [Citations]. Under these circumstances, \* \* \* the transfer \* \* \* did not take effect in possession and enjoyment until the death of the settlor since, until then, it might have become necessary under the terms of the trust to apply the principal to her support, care or benefit.

We can see no substantial difference between that case and the one before us. In fact, the instant case is stronger for the Government in this respect since the decedent, the grantor of the trust, was also one of the trustees.

The petitioners contend, however, that the decedent relinquished this right by the oral agreement she made with her son in 1928; and that, after that time, she had no power to invade the corpus for her own benefit.

The only evidence of this agreement is found in the testimony of John Gallois. He testified that at the time he repaid his mother he insisted upon being made a trustee and on having his mother agree that the corpus would not be touched again, since he felt that inasmuch as his mother had aided him, she might at a future date assist her daughter, who

was then in straitened circumstances, or some other person. He stated that he realized that his sister's financial condition was growing worse and worse and that he wanted to have control of the trust in order to protect his sister and himself.

It does not appear from the above that the decedent and her son had more than an oral agreement that she would not again encumber the [93] trust property in order to render financial assistance to her daughter, or some other person, as she had previously aided her son. Assuming full faith and effect be given to this agreement, there is nothing to show that the decedent relinquished the right to have the principal of the trust applied to her own use and benefit, if the necessity should arise, or that her son would object to such a use of the trust corpus. Moreover, there is no evidence as to the amount of the trust income or the financial status of the grantor. Nor is there evidence that the other trustee was ever informed of the agreement.

We are impressed by the fact that although the trust indenture was in writing, the petitioner is relying on an alleged oral amendment to vary its terms. The normal way to effect an amendment thereof would have been by a similar written instrument.

We are of the opinion that at the date of her death, the decedent, under the terms of the trust, had the right to have the trust principal applied for her support and maintenance and therefore the value of the trust is includible in her gross estate



as a transfer intended to take effect in possession or enjoyment at or after death.

In view of our decision it is not necessary to consider the applicability of the other parts of section 811 (c).

Decision will be entered for the respondent. [94]

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The Tax Court of the United States  
Washington

Docket No. 3507

ESTATE OF MARGARET P. GALLOIS, deceased,  
JOHN E. GALLOIS, Executor, and  
JEANNE G. HILL, Executrix,  
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated February 27, 1945, it is Ordered and Decided: That there is a deficiency in estate tax in the amount of \$19,323.36.

Enter:

(Signed) ERNEST H. VAN FOSSAN  
Judge.

Entered Feb. 27, 1945. [95]



[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT:

To the Honorable, the Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:

Now comes the petitioner in the Estate of Margaret P. Gallois, Deceased, John E. Gallois, Executor, and Jeanne G. Hill, Executrix, and respectfully shows:

I  
Jurisdiction

The petitioners on review, hereinafter referred to as the taxpayers, are John E. Gallois, Executor, and Jeanne G. Hill, Executrix, of the Estate of Margaret P. Gallois, deceased. Said executor and executrix filed a federal estate tax return with the Collector of Internal Revenue of the First District of California, located in the City of San Francisco, State of California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit within [96] the time allowed by law after the date of the death of Margaret P. Gallois on August 8, 1940.

The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

## II

## Nature of Controversy

After the taxpayers duly filed the estate tax return on behalf of the Estate of Margaret P. Gallois, deceased, who died testate on August 8, 1940, the Commissioner determined a deficiency in the estate tax against the Estate of Margaret P. Gallois in the amount of \$19,323.36. The Commissioner included the entire value at the date of the death of Margaret P. Gallois of the corpus of the trust created by her on August 9, 1924, in the estate of the decedent under the provisions of Section 811-C of the Internal Revenue Code. During the years 1919 to 1922 John E. Gallois borrowed a total of \$251,000 from the decedent, Margaret P. Gallois, with no evidence of the indebtedness being executed in writing. On August 9, 1924, Margaret P. Gallois executed a trust, naming herself, Emile M. Pissis and William H. Cook as trustees.

The trustees were directed to apply the income of the trust (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. [97]

Other material provisions of the trust are as follows:

Second: The Trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of

the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund.

Third: Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving Trustees shall continue during the life of Jeanne G. Hill and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving Trustees to said Jeanne G. Hill.

\* \* \* \*

Fifth: Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving Trustee shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois,

and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois.

\* \* \* \*

Ninth: Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000 or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy [98] between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois.

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty (50%) per cent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property



shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois, still exceeds the then value of the trust fund in the hands of said Trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.

The decedent retained no power to alter, amend or revoke the trust.

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had 2 children, John aged 38, and Jeanne aged 36, and 3 grandchildren of the ages of 7, 5 and 1, respectively, all being the children of Jeanne. She left surviving her at her death 2 children, 3 grandchildren, and 3 great grandchildren, Harry Poett III, aged 1 year and 8 months, Caro-



Ian Poett, aged 5 months, [99] and Louise Haley, aged 5 months.

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about 2 years later.

Decedent's daughter, Jeanne, was married to Horace Hill, Jr., who had been well off, but who, in the period from 1924 to 1928, was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about \$42,000.

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of \$251,000 to the trustees.

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Fol-

lowing his appointment as trustee, John paid the balance of his indebtedness.

The Tax Court of the United States approved the Commissioner's [100] determination by including the entire corpus of the trust created by Margaret P. Gallois on August 9, 1924, in the decedent's gross estate under the provisions of Section 811-C of the Internal Revenue Code. The contention of the taxpayers is that this determination is in error and that no part of the trust corpus should be included in the estate of Margaret P. Gallois for estate tax purposes.

### III

#### Assignment of Errors

The taxpayers aver that in the record and proceedings before the Tax Court of the United States and in the opinion and final decision rendered and entered by the Tax Court of the United States, manifest error occurred and intervened to the prejudice of the taxpayers, which now assign the following errors and each of them, which they aver occurred in said record, proceedings, opinion and final decision so rendered by the Tax Court of the United States:

1. Error was committed in including in the corpus of the estate for estate tax purposes the corpus of the trust created August 9, 1924, and that the Tax Court did not properly interpret Section 811-C, excepting from the gross estate the property where there was a bona fide sale for an adequate and full consideration in money or money's worth.

2. Error was committed by the Tax Court of the United States in failing to give proper consideration to the agreement of the decedent that the corpus of the trust would not be invaded again upon the repayment of the \$251,000 by John E. Gallois and by including any part of the trust corpus in the [101] estate for estate tax purposes.

Wherefore, taxpayers respectfully petition that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken to end the errors by review of said Court.

(Signed) CLYDE C. SHERWOOD

(Signed) JOHN V. LEWIS

(Signed) JEROME POLITZER

Attorneys for Petitioners

State of California

City and County of San Francisco—ss.

John V. Lewis, being duly sworn, says: I am one of the attorneys for the petitioners in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. This petition is not filed for the purpose of delay, and I believe

the petitioners are justly entitled to the relief sought.

(Signed)      JOHN V. LEWIS

Subscribed and sworn to before me this 18th day of May, 1945.

[Seal] (Signed) LOUIS WIENER  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed May 24, 1945.

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[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To: Commissioner of Internal Revenue  
Internal Revenue Building  
Washington, D. C.

J. P. Wenchel, Attorney for Respondent  
Chief Counsel, Bureau of Internal Revenue  
Internal Revenue Building,  
Washington, D. C.

You Are Hereby Notified that on the 24th day of May, 1945, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause, was filed with the Clerk of the Court. A copy of the petition as filed is attached hereto and served upon you.

Dated: May 24, 1945.

CLYDE C. SHERWOOD

JOHN V. LEWIS

JEROME POLITZER

Attorneys for Petitioner

Service of the foregoing Notice of Filing and of the copy of Petition for Review is hereby acknowledged this 24th day of May, 1945.

J. P. WENCHEL, CAR

Chief Counsel, Bureau of Internal Revenue,

Attorney for the Respondent

[Endorsed]: T.C.U.S. Filed May 24, 1945.

---

[Title of Tax Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE  
RECORD, PROCEEDINGS AND EVIDENCE  
TO BE CONTAINED IN THE  
RECORD ON APPEAL

To: Commissioner of Internal Revenue,  
Internal Revenue Building  
Washington, D. C.

J. P. Wenchel, Attorney for Respondent  
Chief Counsel, Bureau of Internal Revenue  
Internal Revenue Building,  
Washington, D. C.

You and each of you are hereby notified that the petitioner above named hereby designates the por-



tions of the record, proceedings and evidence to be contained in the record on appeal as follows, to-wit:

1. The docket entries
2. The petition to the Tax Court of the United States
3. Answer of the Commissioner
4. The entire transcript of the evidence prepared by the stenographic reporter
5. Findings of fact, opinion and decision of the Tax Court of the United States
6. Petition for review by the United States Circuit Court of Appeals for the Ninth Circuit and the Assignment of Errors therein contained [106]
7. Notice of filing petition for review and assignment of error
8. This notice designating the portions of the record, proceedings and evidence to be contained in the record on review dated at San Francisco, California, May 18th, 1945.

CLYDE C. SHERWOOD

JOHN V. LEWIS

JEROME POLITZER

Attorneys for Petitioner

Service of the foregoing designation of the portions of the record, proceedings and evidence to be contained in the record on review is hereby acknowledged this 24th day of May, 1945.

J. P. WENCHEL, CAR  
Chief Counsel, Bureau of Internal Revenue,  
Attorney for the Respondent

[Endorsed]: T.C.U.S. Filed May 24, 1945.

---

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 107, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 8th day of June, 1945.

[Seal] B. D. GAMBLE

Clerk,

The Tax Court of the United States.

[Endorsed]: No. 11080. United States Circuit Court of Appeals for the Ninth Circuit. John E. Gallois, Executor and Jeanne G. Hill, Executrix of the Estate of Margaret P. Gallois, Deceased, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the Tax Court of the United States.

Filed June 25, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11080

ESTATE OF MARGARET P. GALLOIS, Deceased; JOHN E. GALLOIS, Executor; and JEANNE G. HILL, Executrix,  
Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

STATEMENT OF FACTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; and

To Samuel O. Clark, Jr., Assistant United States Attorney General; and J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue:

You and Each of You Are Hereby Notified that appellant hereby adopts as its statement of points upon which appellant intends to rely on appeal the following assignment of errors:

1. Error was committed by the Tax Court of the United States in including in the corpus of the estate of Margaret P. Gallois for estate tax purposes the corpus of the trust created August 9, 1924.

2. Error was committed by the Tax Court of the United States in including the corpus of the trust in the estate for estate tax purposes where there was a bona fide sale for an adequate and full consideration in money or money's worth bringing the case squarely within the exception provided for in Section 811(c) of the Internal Revenue Code.

3. Error was committed by the Tax Court of the United States in holding that the corpus of the trust was includible in the estate of Margaret P. Gallois regardless of the fact that Margaret P. Gallois had an oral agreement with John E. Gallois that upon the repayment by John E. Gallois of \$251,000.00 she would not invade the corpus of the trust.

Appellant hereby designates for printing the entire transcript of the proceedings before the Tax Court of the United States.

Dated: June 29, 1945.

CLYDE C. SHERWOOD

JOHN V. LEWIS

JEROME POLITZER

Attorneys for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jul. 2, 1945. Paul P. O'Brien,  
Clerk.



No. 11,080

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

JOHN E. GALLOIS, Executor, and JEANNE G.  
HILL, Executrix, of the Estate of Mar-  
garet P. Gallois, Deceased,

*Petitioners,*

VS.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

Upon Petition to Review a Decision of the Tax Court  
of the United States.

PETITIONERS' OPENING BRIEF.

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JOHN V. LEWIS,

CLYDE C. SHERWOOD,

JEROME POLITZER,

333 Montgomery Street, San Francisco 4, California,

*Attorneys for Petitioners.*

FILED

SEP 13 194

PAUL P. O'BRIEN



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No. 11,080

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

JOHN E. GALLOIS, Executor, and JEANNE G.  
HILL, Executrix, of the Estate of Mar-  
garet P. Gallois, Deceased,

*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

Upon Petition to Review a Decision of the Tax Court  
of the United States.

**PETITIONERS' OPENING BRIEF.**

---

**JURISDICTION OF THE COURT.**

This is a petition to review a decision of the Tax Court of the United States. Petitioners on review are John E. Gallois, executor, and Jeanne G. Hill, executrix, of the estate of Margaret P. Gallois, deceased. The petitioners filed a federal estate tax return with the Collector of Internal Revenue of the First District of California, located in the City of San Francisco, State of California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law



after the date of the death of Margaret P. Gallois on August 8, 1940. The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

The case arose because the Commissioner claimed a deficiency of estate tax against the estate of Margaret P. Gallois in the amount of \$19,323.36. The case regularly came up for hearing before the Tax Court of the United States in San Francisco, California, on September 22, 1944. Upon the 27th day of February, 1945, the said Tax Court of the United States made its findings of fact and opinion and rendered its decision in favor of the respondent for the full amount of the alleged deficiencies. On the 24th day of May, 1945, and within the time allowed by law therefor, petitioners filed their petition for review by the United States Circuit Court of Appeals, Ninth Circuit, with its assignment of errors.

This Court has jurisdiction upon appeal to review the decision of the Tax Court of the United States in question by virtue of the provisions of paragraphs (a) and (b) of Section 1141 of the Internal Revenue Code.

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#### **STATEMENT OF THE CASE.**

Margaret P. Gallois, hereinafter called the decedent, was born March 17, 1856, and died testate on August 8, 1940, a resident of the City and County of San

Francisco, California. The petitioners, John E. Gallois and Jeanne G. Hill, are the duly qualified and acting executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the Collector of Internal Revenue for the First District of California. (T. R. 90.)

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of \$251,000 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill. Therefore, on August 9, 1924, she executed a trust, naming herself, Emile M. Pissis and William H. Cook as trustees. (T. R. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (T. R. 90.)

Other material provisions of the trust are as follows:

Second. The trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and sup-

port by reason of or in the event of any deficiency in the income of said trust fund. (T. R. 91.)

Third. Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving trustees to said Jeanne G. Hill. (T. R. 91.)

Fifth. Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her

children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois. (T. R. 92.)

Ninth. Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois. (T. R. 92.)

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty per cent (50%) of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of



the trust fund in the hands of said trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise. (T. R. 93.)

The decedent retained no power to alter, amend or revoke the trust. (T. R. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had 2 children, John aged 38, and Jeanne aged 36, and 3 grandchildren of the ages of 7, 5 and 1, respectively, all being the children of Jeanne. She left surviving her at her death her 2 children, 3 grandchildren, and 3 great grandchildren, Harry Poett III, aged 1 year and 8 months, Carolan Poett, aged 5 months, and Louise Haley, aged 5 months. (T. R. 94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about 2 years later. (T. R. 94.)



Decedent's daughter, Jeanne, was married to Horace Hill, Jr., who had been well off, but who, in the period from 1924 to 1928, was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about \$42,000. (T. R. 94.)

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of \$251,000, to the trustees. (T. R. 94.)

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness. (T. R. 95.)

By December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent and he was under no legal obligation to pay any part thereof; furthermore, prior to the payments by him,

the trust properties had no value since they were encumbered to an extent in excess of their fair market value. (T. R. 96.)

The above facts are not in dispute, and the question involved is what, if any part, of the corpus of the trust created by Margaret P. Gallois, the decedent, on August 9, 1924, should be included in the decedent's gross estate under the provisions of Section 811 (c) and (i) of the Internal Revenue Code.

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#### **SPECIFICATION OF ERRORS.**

The Tax Court of the United States erred in determining the taxable net estate of Margaret P. Gallois, by including the entire value of the trust corpus in the amount of \$135,330.40 in the net estate for estate tax purposes and did not properly interpret Section 811 (c) and (i) of the Internal Revenue Code excepting from the gross estate the trust where there was a bona fide sale for an adequate and full consideration in money or money's worth. The Tax Court of the United States further erred in failing to give proper consideration to the agreement of the decedent that the corpus of the trust would not be invaded upon the repayment of the \$251,000 by John E. Gallois, and by including any part of the trust corpus in the estate for estate tax purposes.

**ARGUMENT.**

- I. PETITIONERS CONTEND THAT THE PAYMENT BY JOHN E. GALLOIS OF \$251,000 TO THE DECEDENT, MARGARET P. GALLOIS, ON AN OBLIGATION BARRED BY THE STATUTE OF LIMITATIONS BROUGHT THE TRUST SQUARELY WITHIN THE EXCEPTIONS PROVIDED FOR IN SECTION 811 (c) AND (i) OF THE INTERNAL REVENUE CODE, SO THAT NO PART OF THE TRUST ESTATE WAS SUBJECT TO ESTATE TAX IN THE ESTATE OF MARGARET P. GALLOIS.

The Tax Court found that by December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent, and he was under no legal obligation to pay any part thereof; furthermore, prior to the payment by him, the trust properties had no value since they were encumbered to an extent in excess of their fair market value. (T. R. 96.)

Petitioners contend that this brings the case squarely within the provisions of Section 811 (c) and (i) of the Internal Revenue Code which provides as follows:

“(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or en-

joy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(i) Transfers for Insufficient Consideration.— If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

The facts found by the Tax Court were as follows:

"The Trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about \$42,000. (T. R. 94.)

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the de-



cedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of \$251,000, to the trustees. (T. R. 94.)

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness." (T. R. 95.)

The uncontradicted evidence concerning the agreement was as follows:

"(Testimony of John Eugene Gallois.) (T. R. 36-37-38.)

Q. In October of 1928, were you then in a financial position to pay this obligation, the remainder of it.

A. All of it.

Q. And did you have any conversations then, on or about October, 1928, with Margaret P. Gallois concerning the repayment of this money and the trust?

A. I did.

Q. Will you tell approximately the time of the conversation?

A. Oh, probably the end of September and during October of 19—I believe it was '27 or '28, 1928.

Q. And your mother at that time lived where?

A. At the Fairmont Hotel.



Q. Were these conversations held in her room?

A. They were held in her room.

Q. Do you recall whether anyone else besides you and your mother were present at these conversations?

A. I generally was alone. I cannot recall of anybody—my sister might have been there once in awhile, I don't know. I can't—we quite often talked about these things during that period.

Q. Did you come to any definite understanding with your mother as to what you would do as to repaying this money, and what she would do if you repaid it? You can answer that yes or no.

A. Yes.

Q. All right. Now, will you state what that understanding was?

A. Well, I realized at that time that I was morally obligated to my mother, and that I was not (T. R. 36) legally obligated, and having gone through the vicissitudes of those past years and knowing how my mother had worried through those past years, and seeing my sister's financial condition becoming worse and worse, I felt that the shoe was on the other foot at that time, and that I wanted to protect my sister and protect myself. At that time that trust, before I made any repayments, had no financial backing.

Q. You mean by that that the indebtedness—

A. Was greater.

Q. —than the market value at that time?

A. Than the market value of the trust. So I realized that I could have made several arrangements with my mother which would have protected her, but I thought that inasmuch as that trust had been founded partly due to what she

thought were my errors, that it would only be the fair thing to have this thing to go back into the trust, but if that took place, I wanted to have the control of that trust, so that we would never get in the condition that it was in again. In other words, we were to pay off the indebtedness of the trust and really make it something that was good and sound and that never could be touched. I said to mother, I said, 'Mother, I am perfectly willing to do this, although I realize that I don't have to do it, with the understanding that you name me as a Trustee, and also that we will never get into this mess again, and that we will never hit the principal (T. R. 37) (or the corpus, if you want to call it that), and so, to protect me, I must be a trustee.' To which she agreed." (T. R. 38.)

It is the taxpayer's contention that the agreement between John Gallois and Margaret P. Gallois, the decedent, became fully executed when John Gallois paid the balance of the \$251,000, the last payment being \$209,000, and his mother had John Gallois appointed trustee. The Ninth Clause of the trust instrument provided as follows:

"Ninth. Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John E. Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois. (T. R. 92.)

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty (50%) per cent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois, apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.”

(T. R. 93.)

It should be pointed out that under the Ninth Clause of the trust instrument John Gallois was under no obligation whatsoever to pay any money into the trust. Therefore, the payment of the balance of the \$251,000 into the trust was a purchase of an interest in trust under Section 811 (c) and (i) of the Internal Revenue Code.

The Tax Court properly found as follows:

“It should be noted at the outset that, since the trust was created prior to the joint resolution of March 3, 1931, the corpus (91) is not taxable solely because of the fact that the decedent reserved to herself the trust income during her life, *Hassett v. Welch*, 303 U. S. 303; *May v. Heiner*, 281 U. S. 238; *Estate of Edward E. Bradley*, 1 T. C. 518, and the respondent does not contend otherwise.” (T. R. 98.)

It is well settled law that any suspension or forbearance of a legal right constitutes a sufficient consideration for a contract. In *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 60 Pacific 439, 49 L. R. A. 647, it was held that a waiver of the right to plead the statute of limitations to an action to enforce the liability of a bank as a stockholder in a corporation was a sufficient consideration for the promise of a creditor of the corporation to forbear bringing suit for a period of six months, so that the statute was tolled by such an agreement. Certainly the payment by John Gallois of \$251,000 in return for his mother's promise not to invade the principal of the trust and to appoint him trustee so that he could protect his interest in the trust property is sufficient considera-



tion for her promise not to invade the principal of the trust.

The California Civil Code defines consideration as follows:

*“Section 1605. Good Consideration, What. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.”* (Enacted 1872.)

The gross value of the trust property at the time of the death of Margaret P. Gallois as shown by the deficiency letter of the Commissioner was \$139,374.25 and the net value was \$135,330.43. (T. R. 14.)

John E. Gallois paid to his mother and into the trust a total of \$251,000 which he was not legally obligated to pay. The trust estate had no value at the time John E. Gallois made the repayment to his mother. (T. R. 96.) Section 811(i), Internal Revenue Code, provides as follows:

*“(i) Transfers for Insufficient Consideration. If any of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money and money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property other-*



wise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.”

Considering that the trust estate had no value at the time John E. Gallois made the repayments to his mother and that the fair market value of the trust estate at the time of the death of Margaret P. Gallois was \$111,000 less than the \$251,000 paid by John E. Gallois when he was under no legal obligation to repay, it would seem clear that even if the trust was one which was includible in the Margaret P. Gallois estate under 811 I. R. C., there was no excess of the fair market value at the time of her death over the consideration paid by John E. Gallois to be included in the decedent’s estate.

As we have pointed out above, an agreement to waive the statute of limitations is a sufficient consideration to support a promise given in return therefor. In other words, although a promise to do something which one is legally bound to perform is not consideration, the promise to do something which one is only *morally* bound to do is a sufficient consideration for a reciprocal promise. The rule in this regard is stated as follows:

“If he is only, under a moral obligation, as in case of the payment of or promise to pay a debt barred by the Statute of Limitations \* \* \* he gives something he cannot legally be compelled to give, and there is a consideration for the promise given in return.”

17 *Corp. Jur. Sec.*, Section 112, page 468.

II. PETITIONERS CONTEND THAT THE AGREEMENT BETWEEN THE DECEDENT, MARGARET P. GALLOIS, AND JOHN GALLOIS THAT JOHN GALLOIS WOULD PAY BACK THE SUM OF \$251,000 ON AN OBLIGATION BARRED BY THE STATUTE OF LIMITATIONS ON THE CONDITION THAT HE BE MADE A TRUSTEE AND THAT THE CORPUS OF THE TRUST WOULD NOT BE INVADDED MADE THE DOCTRINE OF THE CASE OF *BLUNT v. KELLY*, 131 FED. (2d) 632, INAPPLICABLE AND THAT THE VALUE OF THE TRUST CORPUS IS NOT INCLUDIBLE IN THE DECEDENT'S GROSS ESTATE UNDER SECTION 811 (c) AND (i) OF THE INTERNAL REVENUE CODE.

The Tax Court of the United States found the following facts concerning the oral agreement:

“By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of \$251,000 to the trustees.” (T. R. 94.)

“Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness.” (T. R. 95.)

From these facts the Tax Court reasoned as follows:

“The only evidence of this agreement is found in the testimony of John Gallois. He testified that at the time he repaid his mother he insisted upon being made a trustee and on having his mother agree that the corpus would not be touched

again, since he felt that inasmuch as his mother had aided him, she might at a future date assist her daughter, who was then in straitened circumstances, or some other person. He stated that he realized that his sister's financial condition was growing worse and worse and that he wanted to have control of the trust in order to protect his sister and himself." (T. R. 99-100.)

"It does not appear from the above that the decedent and her son had more than an oral agreement that she would not again encumber the trust property in order to render financial assistance to her daughter, or some other person, as she had previously aided her son. Assuming full faith and effect be given to this agreement, there is nothing to show that the decedent relinquished the right to have the principal of the trust applied to her own use and benefit, if the necessity should arise, or that her son would object to such a use of the trust corpus. Moreover, there is no evidence as to the amount of the trust income or the financial status of the grantor. Nor is there evidence that the other trustee was ever informed of the agreement." (T. R. 100.)

"We are impressed by the fact that although the trust indenture was in writing, the petitioner is relying on an alleged oral amendment to vary its terms. The normal way to effect an amendment thereof would have been by a similar written instrument." (T. R. 100.)

"We are of the opinion that at the date of her death, the decedent, under the terms of the trust, had the right to have the trust principal applied for her support and maintenance and therefore the value of the trust is includible in her gross

estate as a transfer intended to take effect in possession or enjoyment at or after death." (T. R. 100-101.)

John Gallois testified as follows:

"A. Well, the other agreement was that I was to be a Trustee, and that she would not touch the principal of the trust, and I also knew that once that I was a Trustee, that she could not do that, because I could have stopped it, and I was perfectly protected, and as I say, having a quarter of a million dollars that my mother had handed out to me just on my word and on her word, I didn't think it was necessary between us to have anything. The only thing I did that was for the purpose, accounting purposes. I wanted to know that I was vested in \$251,000, if I wanted to borrow on that, which I did later on, from Russell Miller. I figured I was vested in \$251,000, and if I had not repaid the thing in full, or if there had been no record that I paid her in full, I would not have been vested in that." (T. R. 46.)

"Q. You state that you did continually borrow money on your interest?

A. I did.

Q. Did your mother know about that borrowing?

A. She agreed to it and signed it as a Trustee." (T. R. 47.)

It is clear from the evidence that the other trustees considered John Gallois had a vested interest in the trust property after this agreement. The minutes of the meeting of the trustees of the Margaret P. Gallois trust on October 28, 1929 shows clearly that all the



trustees considered John Gallois to have a vested interest in the trust after the oral agreement with his mother. It provided as follows:

Petitioners' Exhibit No. 3

(Copy)

“Meeting of the Board of Trustees of the Margaret P. Gallois Trust, held in the office of Platt Kent, Monday, October 28, 1929.

Present: Mrs. Margaret P. Gallois, Mrs. Jeanne Gallois Hill, Mr. John Gallois.

Mr. Platt Kent acted as Secretary.

It was unanimously resolved that a letter be addressed to Messrs. Russell, Miller & Co. authorizing this firm to call the trust funds which are at present on the call money market and directing them to issue a check in favor of the Trustees.

It was also unanimously agreed that for the time being the money obtained in closing out the account at Russell, Miller & Company shall be invested in a Certificate of Deposit pending further developments in the stock market.

The Trustees also agreed to honor an assignment made by Mr. John Gallois of his beneficial interest in the Trust in favor of Messrs. Russell, Miller & Company in an amount not exceeding \$15,000. In the event Mr. John Gallois should become entitled to any disbursement from said Trust he will submit documentary evidence of the liquidation of his obligation with Russell Miller before this assignment will be considered null and void.” (Tr. 85.)



“There being no further business to be transacted the meeting adjourned.

Secretary:

(Signed) Platt Kent

Approved:

(Signed) Margaret P. Gallois

(Signed) John Gallois

(Signed) Jeanne Gallois Hill (82)”

(T. R. 86.)

After John Gallois was made trustee he had full power to enforce his oral agreement with his mother, and her rights under the *Second* provision of the trust to invade the corpus were effectively waived. The California Civil Code, Section 2268, provides as follows:

“*All must act.* Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. (Enacted 1872.)”

There is no provision in the Gallois trust altering the effect of Civil Code Section 2268. Under Section 2268 of the Civil Code John E. Gallois as trustee had full power to enforce his oral agreement with his mother that she would not invade the principal of the trust, and any invasion would need his consent.

In *Clyde Van Fossen v. Joe Yager*, 65 C. A. (2d) 591, there was an oral agreement whereby two brothers went into possession of a ranch on condition that they would not deal with it so as to prevent inheritance by another brother. The oral agreement was

held enforceable in equity, although not in writing as the third brother had completely performed his obligation under the contract.

After the payment of the \$251,000 John Gallois would have been granted specific performance of his oral agreement in this state.

In *Lucy Cardoza v. W. T. White*, 219 Cal. 474 the facts were as follows:

In 1924 Nunes owned real property in Merced County. He borrowed \$2600 from the First National Bank to secure which loan he executed a deed to the land to Callaghan on September 27, 1924. He delivered this deed to Callaghan, stating that if anything should happen to him, the property was to go to his daughter, the plaintiff. On May 12, 1926, Nunes paid the indebtedness, and the daughter contributed the sum of \$900 to said payment, and Nunes requested Callaghan to convey the property to her. Callaghan thereupon executed a deed to her.

The defendants, judgment creditors of the grantor, argued that the transaction could not be upheld as a trust because while the deed was in writing, the agreement constituting the trust was oral, and hence, violative of the statute of frauds. The Court denied this contention, saying:

“But it is merely unenforceable when, in an action brought to compel performance of its terms, the party to be charged asserts its invalidity. Callaghan, the party obligated, did not refuse to recognize the trust. On the contrary,

he carried out its terms. A creditor of the trustor has no right to challenge the voluntary completed performance by a trustee in such a situation. Indeed, if Callaghan had repudiated his obligation, plaintiff, as the intended beneficiary, could have held him as *constructive trustee* for her benefit. (See *Lauricella v. Lauricella*, 161 Cal. 61 (118 Pac. 430)."

Had litigation arisen between John Gallois and the decedent, the decedent's cause of action would have been based on the oral agreement between them.

In the case of *John L. McCormick v. Samuel A. Brown*, 36 Cal. 180, 1868, the Supreme Court held at page 184:

"When the creditor sues, after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise."

This case has been followed many times by the courts of California. (See *Chabot v. Tucker*, 39 Cal. 434.) In *Elizabeth Heiser v. J. K. McAlpine*, 1937, 20 Cal. App. (2d) 467, the Court held that, in the case of a new promise made while the original obligation is legally enforceable, that if the new promise is not a general promise to pay the obligation according to its original terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy in the original obligation, the action of the plaintiff must

then be upon the substituted, conditional promise and not upon the original obligation.

It is therefore clear that the decedent at the date of her death did not have the right to have the trust principal applied for her support and maintenance and that the decision of *Blunt v. Kelly*, 131 Fed. (2d) 632, is therefore inapplicable.

The testimony of Mr. Gallois with relation to his agreement with his mother, bearing on her waiver of right to resort to the corpus, if he would pay the outlawed obligation was as follows:

“ ‘Mother, I am perfectly willing to do so, although I realize that I don’t have to do it, with the understanding that you name me as a trustee, and also that we will never get into this mess again and *that we will never hit the principal* (T. R. 37) (or the corpus, if you want to call it that), and, so, to protect me I must be a trustee.’ To which she agreed.” (T. R. 38.)

From this testimony of Mr. Gallois, it is clear that both parties intended to retain intact the corpus of the trust providing Mr. Gallois would pay the outlawed obligation and it is plain from the testimony that Mr. Gallois had no intention of making such payment unless such an agreement on the part of his mother was made. Under such circumstances, it is not necessary that the agreement should have been incorporated in a writing.

“A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the

obligations arising from it, so far as the facts are known or ought to be known to the person accepting.”

*Civil Code*, Section 1589;

*W. R. Campbell Company v. Herberts of L. A.*,  
110 Cal. App. 244, at 247 et seq.

Mr. Gallois, in the above testimony, outlined the conditions under which he would make payment, the principal one being that no further resort should ever be made to the corpus of the trust. Mrs. Gallois understood the situation and according to the above testimony, agreed to the stipulations of her son.

Besides, a contract in writing may be altered by an executed oral agreement.

*Civil Code*, Section 1698.

In *Bard v. Kent*, 37 Cal. App. (2d) 160, the general rule is stated at page 163 as follows:

“Any contract in writing may be altered by an executed oral agreement. (C. C. 1698.) The oral agreement of the deceased and defendant in 1929 providing for the COMMISSIONS on said lots A, B, and C, and for the conveyance to him of said Lots 3 and 4 were fully executed in every respect. It is binding upon them and their successors and the parole evidence rule is inapplicable.”

In the present case, the oral agreement, above outlined, between Mr. Gallois and his mother, was fully executed by Mr. Gallois first by giving his note for the outlawed obligation and subsequently paying the balance of \$251,000 to the trust. Mrs. Gallois performed



her part of the obligation by naming Mr. Gallois trustee of the trust. The oral agreement being fully executed barred Mrs. Gallois's right to invade the trust corpus and was a binding legal agreement on her part in this respect.

The testimony of Mr. Gallois with relation to the agreement is uncontradicted. In such case the rule is that uncontradicted testimony not inherently improbable or incredible in itself should not be disregarded by the Court but should be given its full force and effect.

*Shepard v. Shepard*, 65 Cal. App. 310 at 313 and 314;

*Stewart v. Silva*, 192 Cal. 405 at 411 (Concurring Opinion).

There is no legal basis to disregard Mr. Gallois's testimony

“that we will never hit the principal \* \* \* (or the corpus, if you want to call it that) \* \* \* To which she agreed.” (Tr. 37, 38.)

The testimony was uncontradicted, it is not inherently improbable or incredible and is fully consistent with the subsequent conduct of the parties. As is apparent from the findings, the Court did not disbelieve Mr. Gallois. Therefore, the Court should have given full effect to his testimony consistent with the intention of the parties. (T. R. 94.) Mrs. Gallois and the witness agreed that they would never “hit” or invade the corpus of the trust. This agreement would cover any capacity under which Mrs. Gallois could ask for

an invasion of the corpus, including her right as a beneficiary to such diversion of corpus under the terms of the trust. Under such circumstances, the corpus under the agreement was not a part of Mrs. Gallois's estate for estate tax purposes, both parties carried out their agreements implicitly.

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CONCLUSION.

For the reasons above noted petitioners respectfully submit that the decision of the Tax Court of the United States that there is a deficiency for estate tax in the amount of \$19,323.36 was erroneous and should be reversed.

Dated, San Francisco, California,  
September 12, 1945.

Respectfully submitted,

CLYDE C. SHERWOOD,

JOHN V. LEWIS,

JEROME POLITZER,

*Attorneys for Petitioners.*

No. 11080

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**JOHN E. GALLOIS, EXECUTOR, AND JEANNE G. HILL,  
EXECUTRIX OF THE ESTATE OF MARGARET P. GALLOIS,  
DECEASED, PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

---

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**FILED**

**OCT 16 1945**

**PAUL P. O'BRIEN,**

**CLERK**



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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11080

**JOHN E. GALLOIS, EXECUTOR, AND JEANNE G. HILL,  
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DECEASED, PETITIONERS**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

## **BRIEF FOR THE RESPONDENT**

---

### **OPINION BELOW**

The opinion of the Tax Court (R. 89-101) is reported at 4 T. C. 840.

### **JURISDICTION**

The Commissioner of Internal Revenue determined a deficiency in estate tax against the estate of Margaret P. Gallois on August 31, 1943. (R. 10-11.) On November 26, 1943, which was within the 90-day period allowed by the revenue statute, the proper representatives of the estate filed a petition for rede-

termination of such deficiency by the Tax Court (R. 3-9) under the authority of Section 871 of the Internal Revenue Code and its decision determining a deficiency in the amount of \$19,323.36 was filed February 27, 1945 (R. 101). Thereafter, and within the 90 days allowed by statute, the petition for review was filed on behalf of the estate in this Court on May 24, 1945 (R. 102-110), pursuant to Sections 1141-1142 of the Internal Revenue Code.

#### QUESTION PRESENTED

In the trust instrument drawn by the decedent it was provided that the corpus of the trust could be invaded when necessary for her maintenance and she was also to receive the trust income during her life; but it is contended by the taxpayers that the provision relative to invasion of the corpus was abandoned by an oral agreement between decedent and her son, and that the consideration for such agreement was payment by the son of a debt which he owed her but the collection of which was then barred by the statute of limitations.

The question is whether the general provisions of Section 811 (c) of the Internal Revenue Code require the inclusion in gross estate of the value of the trust corpus at date of death, as the Tax Court held; or whether such value may be excluded under an exception in that section allowing exclusion in case of an interest acquired in a bona fide sale for adequate and full consideration in money or money's worth.

## STATUTE INVOLVED

## Internal Revenue Code:

## SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\*                      \*                      \*                      \*                      \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have

been made in contemplation of death within the meaning of this subchapter;

\* \* \* \*

(26 U. S. C. 1940 ed., Sec. 811.)

#### STATEMENT

The facts as found by the Tax Court are as follows:

The decedent, Margaret P. Gallois, died testate on August 8, 1940, a resident of San Francisco, California. The taxpayers, John E. Gallois and Jeanne G. Hill, are executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the Collector of Internal Revenue for the First District of California. (R. 90.)

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of \$251,000 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill, and so, on August 9, 1924, executed a trust. (R. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (R. 90.)



Other material provisions of the trust are as follows: (R. 91-93):

Second: The Trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund.

Third: Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving Trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving Trustees to said Jeanne G. Hill.

\* \* \* \* \*

Fifth: Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving Trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of

the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois.

\* \* \* \* \*

Ninth: Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of \$251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois.

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty

(50%) percent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of the trust fund in the hands of said Trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise.

The decedent retained no power to alter, amend or revoke the trust. (R. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had two children, three grandchildren and three great grandchildren, all of whom survived her. (R. 93-94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about two years later. (R. 94.)

The husband of the decedent's daughter had been well off, but in the period from 1924 to 1928 he was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and decedent's son was constantly being pressed by her son-in-law and others to pay the amount he owed her. The former was unable to make any payments on his indebtedness until 1927, but between December 19, 1927, and September 13, 1928, he made payments aggregating about \$42,000. (R. 94.)

By October, 1928, decedent's son was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and her son then executed his promissory note, dated October 30, 1928, in the sum of \$251,000, to the trustees. (R. 94.)

Following this, and on November 7, 1928, two of the original trustees resigned, and decedent's son and daughter were appointed trustees in their place. Following his appointment as trustee, decedent's son paid the balance of his indebtedness. (R. 94-95.)

On June 19, 1942, the Superior Court of California, for the City and County of San Francisco, entered a



“Decree Terminating Life Estate, etc.” in which it was adjudged that (R. 95)—

upon and by reason of the death of said Margaret P. Gallois, an undivided one-half interest in the real and personal property hereinabove mentioned and described as constituting the property of said trust estate, vested in said John Gallois personally, and the interest of said trust and the Trustees thereof, in said one-half of said trust estate terminated.

The Tax Court held that the entire value of the trust corpus was includible in the gross estate and so found that there is a deficiency in estate tax in the amount of \$19,323.36. (R. 101.)

#### SUMMARY OF ARGUMENT

The Tax Court correctly held that the corpus of the trust created by the decedent should be included in its entirety in her gross estate. Its decision can be sustained on two grounds. The first of these, which was not mentioned by the Tax Court, is the possibility that the trust corpus might revert to the decedent under the terms of the trust. As such provision gave the decedent a contingent interest in the corpus until her death, it was not known until then whether the other interests covered by the trust would actually pass to the beneficiaries named therein. Consequently her death caused a shifting of beneficial interests and makes the entire corpus includible in the gross estate.

The second reason why the Tax Court's decision should be sustained here is that, since the trust agreement gave the trustees the right to invade the corpus



if necessary for the support of the settlor, it could not be known until her death how much, if anything, would be left and so actually the transfers made by the trust could not take effect in possession or enjoyment until her death.

Taxpayers assert that the right to invade the corpus was relinquished by the decedent in an oral agreement with her son whereby he agreed to pay a debt which he owed her. The debt was barred by the statute of limitations but the son agreed to pay if his mother would relinquish her right to trust corpus. It is contended that such oral understanding brings this case within an exception in Section 811 (c) of the Internal Revenue Code which permits exclusion of property from an estate if transferred in connection with a bona fide sale for full and adequate consideration in money or money's worth.

However, it is clear that the alleged consideration does not meet the statutory requirements, and state law, which the taxpayers rely on, cannot be followed in determining what consideration is necessary for federal estate tax purposes.

#### ARGUMENT

**Section 811 (c) of the Internal Revenue Code requires the corpus of the trust here to be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after death**

The only question here is whether the corpus of the trust created by the decedent in 1924 should be included in her gross estate under the provisions of Section 811 (c) of the Internal Revenue Code, *supra*. That section provides, in substance, for the inclusion

of any interest of which the decedent has made a transfer in trust which was intended to take effect in possession or enjoyment at or after her death, or under which she retains an interest in the property or the income therefrom for life or other period which does not end with death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The Tax Court decided that this section required the entire trust corpus to be included in the decedent's gross estate on the ground that, since the trust instrument allowed the corpus to be invaded for the benefit of the decedent, as settlor, it could not be determined until her death whether any of the trust would pass to the named remainderman. (R. 98.)

We submit that its decision is correct and is, as we shall show below, in accord with the applicable decisions. There is also another reason why the transfer under the trust was one intended to take effect at decedent's death, namely, that there was a possibility that the corpus would revert to her and it could not be known until her death that it would not do so.<sup>1</sup> This second reason for inclusion of the trust corpus in the gross estate was set forth in the Government's brief

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<sup>1</sup> The trust instrument provides in regard to the possibility of reverter that (R. 71)—“In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. *If said Jeanne G. Hill and her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust fund shall vest in said Margaret P. Gallois.*” [Italics supplied.]

with the Tax Court but was not mentioned by the Tax Court. However, as this additional ground for the decision here was the basis for three recent decisions of the Supreme Court involving similar transfers in trust, we will discuss these cases first.<sup>2</sup>

**A. The possibility of reverter to the decedent prevented the transfers to beneficiaries of remainder interests from taking effect until her death**

The trust instrument provides that if decedent's daughter and the latter's children (all beneficiaries of remainder interests) predeceased her, then the trust was to terminate and the trust fund was to vest in the decedent, who was also to get the trust income for life, with certain exceptions not material here. (R. 71.) This possibility of reverter to the decedent requires the trust corpus to be included in the decedent's gross estate. *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113; *Goldstone v. United States*, decided by the Su-

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<sup>2</sup> The last of these cases was decided by the Supreme Court several months after the Tax Court's decision. The other two were decided shortly before but it may be that the Tax Court was not aware that they had been decided. Thus it may have considered the question there still undecided in all three of the cases and may have hesitated to refer to them because prior thereto two other decisions raised some doubt as to the extent to which possibility of reverter could be relied on as a basis for including trust property in an estate. See *Commissioner v. Kellogg*, 119 F. 2d 54 (C. C. A. 3d), and *Lloyd's Estate v. Commissioner*, 141 F. 2d 758 (C. C. A. 3d), which cases seemed to indicate that mere possibility of reverter was not sufficient to warrant inclusion. However, the facts in those cases are distinguishable from the facts here. Moreover, those cases must be considered in the light of the subsequent Supreme Court decisions, and if in conflict, can be given effect only to the extent warranted by the later decisions.

preme Court June 11, 1945 (C. C. H. Inheritance Estate and Gift Tax Service, par 10,209). These cases clarify and interpret *Helvering v. Hallock*, 309 U. S. 106, in such a way as to indicate clearly that transfers like that in the instant case are taxable under Section 811 (c).<sup>3</sup> Also see *Eldredge v. Rothensies*, 150 F. 2d 23 (C. C. A. 3d).

In *Fidelity Co. v. Rothensies*, *supra*, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Supreme Court, approving the principles set forth in *Klein v. United States*, 283 U. S. 231, and *Helvering v. Hallock*, *supra*, held that the full value of the corpus was includible in the grantor's gross estate as a transfer under Section 302 (c) of the Revenue Act of 1926, the provisions of which have been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111-112):

It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measure-

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<sup>3</sup> Since the trust in the instant case was created in 1924, we are not here relying upon the specific statutory amendments in 1931 and 1932, relating to the retention of income for life and making such fact by itself sufficient basis for inclusion. Those amendments operate prospectively only. *Hassett v. Welch*, 303 U. S. 303.



ment of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering v. Hallock, supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. *It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries.* The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants. [Italics supplied.]

In the *Field* case, *supra*, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property was includible in his gross estate under Section 302 (c), *supra*. In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 16) :

The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncer-



tain may be the decedent's reversionary interest. *If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.* [Italics supplied.]

In the *Goldstone* case, *supra*, the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (c), *supra*. In so holding the Court took the view that the wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determination of the ultimate possession or enjoyment of the property, the transfer was taxable.

With these principles in mind, it is clear that the transfer in the trust here was one to take effect at

death. The decedent not only retained the trust income for life but there was also a possibility that the corpus would revert to her. Thus her death ripened and enlarged the interests of the remaindermen and their rights were conditional upon survivorship in a very real sense. Therefore the possibility of a reverter here is sufficient reason for taxing the trust corpus and should be considered as a ground for sustaining the Tax Court's decision in addition to the one stated in its opinion.

**B. The corpus of the trust must be included in the gross estate because the trustees had the right to invade it for the benefit of the decedent**

The trust instrument not only gave the decedent the trust income for life, with certain exceptions not material here, but it also authorized the trustees to apply any portion of the principal of the trust fund to the maintenance and support of the decedent at any time that they might consider it necessary. (R. 69-70.) In relying on this provision for its decision, the Tax Court stated (R. 98) that it could not be known, until the decedent's death, whether any of the corpus would pass to the named remaindermen and pointed out that the instant case is substantially the same as *Blunt v. Kelly*, 131 F. 2d 632 (C. C. A. 3d). In that case the decedent created a trust providing in part that should, in their opinion, the necessity arise, the trustees were empowered to use such portion of the corpus of the trust fund as might seem proper for the support, care or benefit of the settlor. The decedent was not a trustee but one of the trustees was her son, who was also a remainderman under the trust.

It was contended that, since one of the trustees was a remainderman and so had an interest adverse to that of the settlor with respect to the principal, she thereby effectively terminated her interest therein. But the court said (p. 634):

It is true that under this provision the trustees, one of whom held an adverse interest, were required to form an opinion as to the existence of any such necessity, but in so doing the trustees were not making a free and uncontrolled decision. They were of course bound to form their opinion on the existence of any such necessity in good faith and were subject to the control of the equity courts if they failed to do so. \* \* \* Under these circumstances, \* \* \* the transfer \* \* \* did not take effect in possession and enjoyment until the death of the settlor since, until then, it might have become necessary under the terms of the trust to apply the principal to her support, care or benefit.

The same conclusion was reached under similar circumstances in *Chase Nat. Bank of City of New York v. Higgins*, 38 F. Supp. 858 (S. D. N. Y.). Also cf. *Merchants Bank v. Commissioner*, 320 U. S. 256.

There being no substantial difference in the facts here, we submit that the *Blunt* case, *supra*, is applicable here and that the Tax Court has properly interpreted the law. However, the taxpayers, without apparently denying that the trust corpus would be includible under the general provisions of Section 811 (c), assert that it comes within the exception contained therein and should be excluded for that reason.

C. The transaction between the decedent and her son relative to the payment of his debt was not a bona fide sale with the consideration required by Section 811 (c) and so does not come within the exception of that section allowing exclusion of property under the conditions prescribed therein

As we have just indicated, counsel for taxpayers confine their whole argument to a discussion of the exception in Section 811 (c) allowing transfers in trust, which might otherwise be includible in a gross estate, to be excluded if made "in a bona fide sale for an adequate and full consideration in money or money's worth". It is their contention that this case comes within such exception because decedent's son gave consideration which meets the requirements of this statutory provision and so permits exclusion of the entire trust corpus. In making this assertion counsel rely upon the facts (1) that the debt, which John Gallois owed his mother, decedent here, and which was the chief reason for the trust being created, was barred<sup>4</sup> by the statute of limitation by December, 1927, (2) that the decedent, in order to secure the money for such loan, had found it necessary to encumber her property, which was later transferred to the trust, and that such encumbrances exceeded its fair market value by the time payment was made in 1928; and (3) that the son paid his debt because of an oral understanding in 1928 with his mother that, if he would do so, she would have him made one of the trustees and would see that the corpus was not invaded again. In other words, counsel contend that this oral

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<sup>4</sup> Taxpayers contend there was no legal obligation to pay but it is well settled that such debts are not extinguished. Thus the obligation remained but was unenforceable.



understanding between mother and son, four years after the creation of the trust, amounted to "a bona fide sale" and that the repayment by the son of the money which his mother had loaned him was in fact an outright purchase, with the required statutory consideration, of the entire remainder interests in the trust, which up to that time had been transferred by the mother, under the conditions set out in the trust deed, as a gift to the decedent's daughter and grandchildren, and to her son, in case he paid his debt.

Before answering this contention, we wish to call attention to the fact that this argument of the taxpayers, even if approved and adopted in its entirety, is in no respect an answer to the position taken by us in subdivision A, *supra*. Thus, the taxpayers' contention in no way affects what we have said there, and so, regardless of what view is held as to this phase of the case, the Tax Court's decision should still be affirmed on the basis of the Supreme Court cases cited above.

However, this does not mean that we consider the taxpayers' contention well founded in any respect. In the first place we submit that however the oral understanding between the decedent and her son should be described (and the facts concerning it are meager and are derived wholly from the son's testimony), it was not "a bona fide sale" within the meaning of Section 811 (c). It must be remembered that the creditor here was a mother who had made quite a sacrifice in order to make the loan to her son, and who was afraid that she had jeopardized her daughter's share in the property which would pass at the



mother's death. Thus, to protect her daughter's interests, the mother set up a trust transferring certain property, upon her death, as gifts to her daughter, and also to her son, if he had paid his debt by that time. But the mother, being in need of money for her own maintenance, had provided for trust income, above expenses, to be paid to her, and also authorized the trustees, of whom she was one, to invade the trust corpus whenever they thought it necessary for her support. It is hard to believe that the mother intended the oral understanding with her son to be treated as an absolute relinquishment of her rights to trust corpus, or "a bona fide sale" of the trust estate which she, while reserving certain interests to herself, had directed to be given to her children at her death. Nor can we believe that the son would have felt himself bound, after he became a trustee, to have prohibited any invasion of the trust corpus if his mother had needed it for her support.

Of course, the proper way to have secured a relinquishment of the mother's rights to trust corpus, if a relinquishment could have been obtained,<sup>5</sup> was to have had the mother do so in a written document signed

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<sup>5</sup> Obviously the oral understanding referred to cannot be treated as an amendment to the trust agreement since the decedent retained no power to alter or amend such agreement. (R. 93.) Thus, as the trustees were authorized to invade the corpus when necessary for the mother's support, the oral understanding cannot be interpreted as changing or limiting the powers expressly given to the trustees and the contention in regard to relinquishment does not extend to the provision allowing the estate to revert to the decedent under certain conditions. That provision would still stand even if right to invade for support was given up.

by her. But there is no such document, and in a letter written by the mother in 1928, at the time this oral understanding was reached, she did not intimate in any way that she had relinquished any rights but confined her remarks to the payments by her son on his debt. (R. 44.) We submit that in view of the nature of the evidence and its meagerness there was substantial basis for the Tax Court's finding that there was no relinquishment by the mother of her rights. (R. 100.) Consequently, as the question of relinquishment is one within the competence of the Tax Court and presents at least a question of mixed fact and law, if not one wholly of fact, the Tax Court's conclusion in regard to the relinquishment should be adopted here. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

We also submit that the payment of the debt here by the son was not the consideration required by Section 811 (c). Actually, such payment merely cancelled the debt which the son had long owed to his mother. Consequently it seems far-fetched to treat repayment of such a loan, which was admittedly owed, as consideration for the purchase of the valuable property rights under the trust which the son allegedly secured in 1928. But whether or not repayment of this loan might be treated as consideration under the laws of California, because its collection was barred by the local statute of limitations, it certainly does not follow that such repayment was "full and adequate consideration in money or money's worth" for federal tax purposes.

In contending that the required consideration was paid here, counsel for taxpayers have cited a number of California cases which show, for the most part, that in the circumstances there considered, oral agreements were given force and effect. However, even if the facts here were not somewhat different from those cases, we would still not be bound by them. As this Court pointed out in *Commissioner v. Greene*, 119 F. 2d 383, the rule is that state law may control federal tax cases only when the federal revenue statute, "by express language or necessary implication, makes its own operation dependent upon state law." (P. 385.) While that case involved gift tax, a question was also presented there as to what constituted consideration for federal tax purposes, and this Court held that it was not bound by state law as there was nothing in the gift tax provisions indicating that state law was to govern.

This Court also reached the same conclusion in *Giannini v. Commissioner*, 148 F. 2d 285, in construing Section 302 (c) of the Revenue Act of 1926, which corresponds to the provision in Section 811 (c), involved here. There this Court held that the transfer of property in trust by decedent in consideration that his parents also transfer property to the same trust was not full and adequate consideration in money or money's worth. This Court also stated that the existence of legal consideration according to local law is immaterial under the statutory provision involved there, and indicated that the federal courts had and should construe such provision strictly. Also see

*Taft v. Commissioner*, 304 U. S. 351, and *Commissioner v. Bristol*, 121 F. 2d 129 (C. C. A. 1st).

In view of these decisions and the clear language of Section 811 (c), we submit that the son did not give the consideration required in the exception. And, as we have pointed out above, the Tax Court found, and properly so, that the decedent did not relinquish her right to invade the corpus. Hence, decedent retained an interest in the trust corpus which was subject to invasion up to date of her death. Such transfers are specifically covered by Section 811 (c); and decedent merely agreed to do, and did, that which the federal statute subjects to estate tax.

#### CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1945.





No. 11088

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

vs.

THE BANK OF CALIFORNIA, National Association,  
Executor of the Estate of Margaret  
Eyre Girvin, Deceased,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

FILED

OCT 30 1945

PAUL P. O'BRIEN,  
CLERK



No. 11088

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

ALLEN G. WRIGHT, Esq.,  
E. H. JULIEN, Esq.

For Commissioner:

EUGENE HARPOLE, Esq.

Docket No. 2396

THE BANK OF CALIFORNIA, National Association, Executor of the Last Will and Testament of Margaret Eyre Girvin, Deceased,

Amended Title: ESTATE OF MARGARET EYRE GIRVIN, Deceased, The Bank of California, N. A., Executor, (See Order 8/3/43),  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

(Transferred to Judge Oppen 11/21/44)

## DOCKET ENTRIES

1943

Jul. 14—Petition received and filed. Taxpayer notified. Fee paid.

Jul. 16—Copy of petition served on General Counsel.

Jul. 14—Request for Circuit hearing in San Francisco, filed by taxpayer. 7/16/43 Granted.

Aug. 2—Motion to amend caption filed by taxpayer.

1943

Aug. 3—Order amending caption to read, Estate of Margaret Eyre Girvin, dec'd., The Bank of California, N. A., Executor, entered.

Aug. 9—Answer filed by General Counsel.

Aug. 12—Copy of answer served on taxpayer. San Francisco, California.

1944

Aug. 10—Hearing set September 18, 1944—San Francisco, California.

Sep. 18—Hearing had before Judge Van Fossan on merits. Stipulation of facts and appearance of Edward Hale Julien filed at hearing. Briefs due 10/18/44. Replies due 11/3/44.

Oct. 14—Transcript of hearing 9/18/44 filed.

Oct. 16—Brief filed by General Counsel.

Oct. 18—Brief filed by taxpayer. 10/18/44 Copy served.

Oct. 31—Reply brief filed by taxpayer. 11/1/44 Copy served.

Nov. 2—Reply brief filed by General Counsel. Served 11/3/44.

Dec. 7—Memorandum opinion rendered. Judge Oppen. Decision will be entered for the petitioner. Copies served 12/8/44.

Dec. 7—Decision entered. Judge Oppen. Div. 4.

1945

Mar. 1—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

1945

Mar. 19—Proof of service filed. (Allen G. Wright and Ed. Hale Julien).

Mar. 19—Proof of service filed. (The Bank of California N. A. Executor, et al.)

Mar. 29—Certified copy of order from 9th Circuit extending time to 7/10/45 to prepare and transmit record filed.

Jun. 15—Statement of points to be relied upon filed by General Counsel with proof of service thereon.

Jun. 15—Designation of record, proceedings and evidence to be contained in record filed by General Counsel with proof of service thereon. [1\*]

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The Tax Court of the United States  
Docket No. 2396

THE BANK OF CALIFORNIA, National Association, Executor of the Last Will and Testament of Margaret Eyre Girvin, Deceased,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the

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\*Page numbering appearing at top of page of original certified Transcript of Record.

Commissioner in his notice of deficiency (Bureau Symbols MT-ET-10935—First California) dated June 23, 1943, and as a basis for its proceeding alleges as follows:

1. The Petitioner is a national association organized, created and existing under and by virtue of the laws of the United States of America, and the duly appointed, qualified and acting executor of the Last Will and Testament of Margaret Eyre Girvin, deceased, whose address is at 400 California Street, San Francisco (20) California.

2. The notice of deficiency (a copy of which is hereto attached and marked "Exhibit A") was mailed to the Petitioner on June 23, 1943. [2]

3. The taxes in controversy are estate taxes for the calendar year 1941 (the decedent dying January 16, 1941). The deficiency asserted is \$14,344.29. The amount in controversy is the whole of said asserted deficiency of \$14,344.29. The estate tax return was filed in the First California Collection District.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) In determining the asserted value of the net estate of the decedent for the basic tax imposed by the applicable revenue acts, the respondent erroneously included in the gross estate of the decedent, the asserted value of an absolute and irrevocable transfer in trust made by the decedent without any reservations, under date of June 26, 1924, and not made by her in contemplation of death, which is



referred to in the statement accompanying said notice of deficiency set forth in said "Exhibit A" as the "trust established September 14, 1925" and did so without authority of law.

(2) In determining the asserted value of the net estate of the decedent for the additional tax imposed by the applicable revenue acts, the respondent erroneously included in the gross estate of the decedent, the asserted value of the aforesaid transfer in trust, and did so without authority of law.

(3) In determining the proposed deficiency, the respondent erroneously failed to exclude from the gross estate of the decedent, the property conveyed by the aforesaid transfer in trust, and the asserted or any other value thereof, as required and provided by law, and

(4) The respondent erred in determining a deficiency herein in the sum of \$14,344.29, or any other sum or at all, when the facts of the case disclose no deficiency at all.

5. The facts upon which the Petitioner relies as sustaining the foregoing assignments of error are those which follow:

(1) Richard Donald Girvin, the husband of said Margaret Eyre Girvin, died April 5, 1924, leaving a Last Will which was duly admitted to probate by order duly given and made by the Superior Court of the State of California in and for the City and County of San Francisco on June 25, 1924.

(2) The estate of said Richard Donald Girvin, deceased, consisted of his separate property and an undivided one-half interest in and to the commu-

nity property of himself and said Margaret Eyre Girvin, his wife.

(3) In and by said Will, said Richard Donald Girvin, after making certain specific bequests, devised and bequeathed all the rest and residue of his estate (over which he had power of testamentary disposition) to The Bank of California National Association of San Francisco in trust, among other matters to collect and receive the income therefrom and to pay the net income therefrom to said Margaret Eyre Girvin, his wife, during her [4] lifetime, and after her death to divide the trust fund between their two children, a son and a daughter, in certain proportions, or their issue, and in default of any issue of the son or daughter who might fail to survive the wife, the trust fund was to go to the surviving son or daughter, as the case might be, or to their issue. A copy of the Last Will of said Richard Donald Girvin, deceased, is attached hereto, marked "Exhibit B", and is hereby referred to, incorporated in, and made a part hereof.

(4) At the time said Will of said Richard Donald Girvin was made and at the time of his death, he had the power of testamentary disposition over his separate property and one-half of the community property of himself and his said wife.

(5) Following the death of said Richard Donald Girvin, the said Margaret Eyre Girvin did by her deed of trust made under date of June 26, 1924, grant, bargain, sell and convey to The Bank of California National Association aforesaid as trustee, all her community property or interest in or

to the estate of said Richard Donald Girvin herein, deceased, which went to, belonged to or might belong to her as the surviving spouse of said deceased, to have and to hold in trust, however, for the same uses and purposes as those declared and set forth in said Will of said deceased, and for the term therein stated, all as more fully stated in said deed of trust, a full, true and [5] correct copy of which is attached hereto, marked "Exhibit C", and is hereby referred to, incorporated in, and made a part hereof. The aforesaid trust was accepted by said The Bank of California National Association in writing duly executed by it on the 26th day of June 1924. The administration of the estate of said Richard Donald Girvin, deceased, was later brought to a close by the said Superior Court by its "decree settling final account and of final distribution" duly made and entered therein on the 14th day of September 1925, in which said Court referred to said deed and directed distribution to be made in accordance with the terms of said Will and said deed.

(6) The transfer in trust effected by the said deed of trust and recognized by the said decree of said Court was an absolute, irrevocable transfer of property in or to which said Margaret Eyre Girvin reserved no estate, right, title or interest.

(7) The said transfer in trust was made by said Margaret Eyre Girvin to escape the responsibility of management of the property so transferred and was not made in contemplation of death.

(8) The said Margaret Eyre Girvin died, testate, in the City and County of San Francisco, State of California, on the 16th day of January 1941, and she left surviving her, Richard Girvin, her son, and Lee Girvin Tevis, her daughter; and [6]

(9) The Federal estate tax return of the estate of said Margaret Eyre Girvin, deceased, was filed by the Petitioner herein with the Collector of Internal Revenue at San Francisco, California, on or about the 24th day of September 1941, and it disclosed an estate tax of \$2,022.35 which was paid in full by your Petitioner to said Collector on or about the 7th day of April, 1942.

6. Wherefore the Petitioner Prays that this Tax Court may hear the proceeding and determine that there is no deficiency or deficiency tax due or owing from the Petitioner or from the estate of said decedent, Margaret Eyre Girvin.

Dated: San Francisco, California, July 7, 1943.

ALLEN G. WRIGHT,

Counsel for Petitioner [7]

State of California,

City and County of San Francisco—ss.

N. D. Platt, being first duly sworn, deposes and says: that he is the duly appointed, qualified and acting assistant trust officer of the above named, The Bank of California National Association of San Francisco, California; that he makes this affidavit for and on behalf of said national association; that he has been duly authorized by it to so

make this affidavit; that The Bank of California National Association aforesaid, is now and ever since the 5th day of February 1941 has been the duly appointed, qualified and acting executor of the Last Will and Testament of Margaret Eyre Girvin, deceased, mentioned in the foregoing petition; that your deponent has read the foregoing petition and knows the contents thereof and is familiar with the statements contained therein; and that the facts stated therein are true of his own knowledge except as to those facts stated to be on information or belief, and those facts so stated, he believes to be true.

N. D. PLATT

Subscribed and sworn to before me this 8th day of July 1943.

(Seal)

EDITH VIA

Notary Public in and for the City and County of San Francisco, State of California. [8]



## EXHIBIT "A"

Form 1236

Office of

Internal Revenue Agent in Charge

San Francisco Division

IRA:ET:90-D:CSW

(C:TS:PD SF:WGW:90-D)

Treasury Department

Internal Revenue Service

74 New Montgomery Street

San Francisco, 5, California

June 23, 1943

Estate of Margaret Eyre Girvin, Deceased,  
Bank of California, N. A., Executor,  
400 California Street,  
San Francisco, California

MT-ET-10935—First California

Estate of Margaret Eyre Girvin

Date of Death: January 16, 1941

Sirs:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of \$14,344.29, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may

file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, 5, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By F. M. HARLESS,

Internal Revenue Agent in  
Charge

Enclosures:

Statement

Form or waiver [9]

ESTATE TAX

San Francisco

IRA:ET:90-D:CXW

(C:TS:PD SF:WGW:90-D)

MT-ET-10935—First California

Estate of Margaret Eyre Girvin

Date of Death: January 16, 1941

## Statement

	Liability	Assessed	Deficiency
Estate Tax	\$16,366.64	\$2,022.35	\$14,344.29

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the protest dated March 23, 1942, and to the statements made at conferences held on April 24 and May 11, 1942, and on June 25 and August 5, 1942.

A copy of this letter and statement has been mailed to your representative, Mr. Allen G. Wright, care of Wright & Wright & Larson, 1010 Mills Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Net Estate

Net estate for basic tax as disclosed by return.....	\$	0.00
Net estate for additional tax as disclosed by return....	\$	37,981.30
Additions to value of net estate and decreases in deductions:		
(a) Transfers during decedent's life,		
Schedule G of return .....	\$97,854.81	
Decreases in deductions .....	0.00	97,854.81
Total.....	\$	135,836.11
Reductions in value of net estate and increases in deductions: .....		0.00
Net estate for additional tax as adjusted.....	\$	135,836.11
Net estate for basic tax as adjusted.....	\$	75,836.11

## Explanation of Adjustments

(a) Transfers during decedent's life,			
Schedule G of return:		Returned	Determined
Item 1—Decedent's trust established			
September 14, 1925 .....	\$	0.00	\$97,854.81

Effective September 14, 1925, Margaret Eyre Girvin transferred to Bank of California, N. A., in trust all her community property or interest in the community estate of herself and her deceased husband, Richard Donald Girvin. Richard Donald Girvin died on April 5, 1924. That part of the property over which the latter had power of testamentary disposition, and remaining after administration and payment of specific bequests, was distributed on September 14, 1925 to the above-named Bank of California, N.A., in trust, pursuant to decree of the probate court and his will. The trust created by Richard Donald Girvin provided that the income was to be paid to Margaret Eyre Girvin during her lifetime, and after her death the trust fund to be divided between their two children, namely, a son and a daughter, pursuant to the terms specified in the will, and if either child die in the lifetime of said Margaret Eyre Girvin, leaving issue at her death, such issue shall take the share which his or their parent would have taken, and if either son or daughter of Richard Donald Girvin die in the lifetime of Margaret Eyre Girvin without issue, then on the death of Margaret Eyre Girvin, the surviving child shall take the whole of the trust fund. The deed of trust made by Margaret Eyre Girvin provided that it was made upon the same uses and purposes as those declared and set forth in the will of Richard Donald Girvin, and the terms stated therein. The combined fund created by the above-mentioned transfers had a value amounting to \$195,709.62 at the time of Margaret Eyre Girvin's

death on January 16, 1941. It is held that she contributed one-half to the fund upon its creation in 1925, and, therefore, one-half of said \$195,709.62, or \$97,854.81, is includible in her estate. See Section 811 of the Internal Revenue Code.

### Computation of Estate Tax

	Returned	Determined
Gross estate .....	\$ 88,659.18	\$186,513.99
Deductions for basic tax..	110,677.88	110,677.88
Net estate for basic tax....	\$ 0.00	\$ 75,836.11
Net estate for additional tax .....	\$ 37,981.30	\$135,836.11
Gross basic tax .....	\$	1,016.72
Credit for State inheritance, etc., taxes		813.38
Net basic tax .....		\$ 203.34
Total gross taxes (basic and additional)	\$	15,692.14
Gross basic tax .....		1,016.72
Net additional tax .....		\$ 14,675.42
Total net basic and additional taxes.....		\$ 14,878.76
Defense tax (10%) .....		1,487.88
Total tax payable .....		\$ 16,366.64
Estate tax assessed:		
Amount shown on return, assessed on Original, List September 1941 (S), page 100, line 5.....		2,022.35
Deficiency .....		\$ 14,344.29

[Endorsed]: T.C.U.S. Filed July 14, 1943.



[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. (1) to (4), inclusive. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in subparagraphs (1) to (4), inclusive, of paragraph 4 of the petition. [13]
5. (1) Admits the allegations contained in subparagraph (1) of paragraph 5 of the petition.  
(2) Admits the allegations contained in subparagraph (2) of paragraph 5 of the petition.  
(3) Admits the allegations contained in subparagraph (3) of paragraph 5 of the petition.  
(4) Admits the allegations contained in subparagraph (4) of paragraph 5 of the petition.  
(5) Admits the allegations contained in subparagraph (5) of paragraph 5 of the petition.  
(6) Denies the allegations contained in subparagraph (6) of paragraph 5 of the petition.

(7) For lack of information denies the allegations contained in subparagraph (7) of paragraph 5 of the petition.

(8) Admits the allegations contained in subparagraph (8) of paragraph 5 of the petition.

(9) Admits the allegations contained in subparagraph (9) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed)

J. P. WENCHEL TMM

Chief Counsel, Bureau of  
Internal Revenue

Of Counsel:

B. H. NEBLETT,

Acting Division Counsel

T. M. MATHER,

Special Attorney, Bureau of  
Internal Revenue [14]

[Endorsed]: T.C.U.S. Filed Aug. 9, 1943.

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[Title of Tax Court and Cause.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the following facts shall be taken to

be true in the above-entitled proceeding and received as evidence therein, together with all exhibits attached to this stipulation and made a part hereof; subject to the right of either party to offer further and additional evidence not inconsistent with or contrary to the matter herein stipulated;

I. The petitioner, Estate of Margaret Eyre Girvin, The Bank of California, National Association, Executor, is the estate of a deceased person, with its address and principal place of business at San Francisco, California.

II. Margaret Eyre Girvin was born October 7, 1862, and died testate on January 16, 1941, a resident of the State of California and County of San Francisco. [15]

III. The value of the gross estate of Margaret Eyre Girvin, as reported upon the estate tax return filed, was \$88,659.18.

IV. Undisputed deductions from the reported estate, exclusive of the specific exemption, amount to \$10,677.88.

V. By an indenture or deed of trust made on the 26th day of June, 1924, by and between said Margaret Eyre Girvin, as donor, and The Bank of California, National Association, as trustee, a full and correct copy of which is attached hereto, made a part hereof, and marked Exhibit 1, said Margaret Eyre Girvin transferred in trust as specified in said Exhibit 1, property which on January 16, 1941, the date of her death, had a fair market value of \$97,854.81. No part of said property or of the value thereof was included in the gross estate reported

upon the federal estate tax return filed for the Estate of Margaret Eyre Girvin, deceased. The Commissioner of Internal Revenue has determined that said amount should be added to the reported gross estate in determining the federal estate tax due from said Estate of Margaret Eyre Girvin, Deceased.

VI. Richard Donald Girvin, husband of Margaret Eyre Girvin, pre-deceased her, having died testate on April 5, 1924. His will was admitted to probate by order of the Superior Court of the State of California in and for the City and County of San Francisco, on June 25, 1924. A full, true and correct copy of the last will and testament of said Richard Donald Girvin is attached hereto, made a part hereof, and marked Exhibit 2. [16]

VII. A decree of final distribution of the estate of Richard Donald Girvin was duly made, entered and filed in said probate proceeding on the 14th day of September, 1925. No appeal therefrom has ever been taken and said decree is now final.

VIII. The estate of Richard Donald Girvin consisted of his separate property and an undivided one-half interest in and to the community property of himself and Margaret Eyre Girvin, his wife.

IX. Following the death of Richard Donald Girvin, her husband, Margaret Eyre Girvin, the widow, did, by said indenture or deed of trust dated June 26, 1924, Exhibit 1 to this stipulation, dispose of her entire undivided community interest in the community property of herself and said Richard Donald Girvin upon the same uses, terms, condi-

tions and limitations declared and set forth in the will of Richard Donald Girvin, deceased.

X. Richard Girvin and Lee Girvin Tevis, son and daughter, respectively, of the decedents Richard Donald Girvin and Margaret Eyre Girvin, survived both of said parents.

ALLEN G. WRIGHT

EDWARD HALE JULIEN

Counsel for Petitioner

J. P. WENCHEL TMM

Chief Counsel, Bureau of Internal Revenue,

Counsel for Respondent.

Of Counsel:

B. H. NEBLETT,

Division Counsel

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue [17]

“EXHIBIT No. 1”

This Indenture or Deed of Trust, made this 26th day of June, 1924, by and between Margaret Eyre Girvin, a widow, of the City and County of San Francisco, State of California, the party of the first part herein, and The Bank of California National Association, a national banking association duly organized, created and existing under and by virtue of the laws of the United States of America, having its principal place of business in said City and County of San Francisco, and duly authorized and quali-



fied to conduct the business of a trust company in said State of California, party of the second part herein.

Witnesseth, That

Whereas, Richard Donald Girvin, the husband of said party of the first part, died in said City and County on the 5th day of April, 1924, leaving a Last Will and Testament bearing the date of August 31st, 1922, which, in the course of proceedings for the probate whereof, was admitted to probate by an order duly made and entered on the 25th day of June, 1924, in the matter of the estate of said Richard Donald Girvin, deceased, in and by the Superior Court of the State of California, in and for said City and County, and

Whereas, in and by said Last Will and Testament, after making certain specific bequests to his widow a brother, and two children, the testator, the said Richard Donald Girvin, gave, devised, bequeathed and appointed all his real and personal estate not by said Will or by any Codicil thereto otherwise specifically disposed of and which (as said testator expressed himself in said [18] Will) he could dispose of by will in any manner he thought proper unto his Trustee, to wit; the said party of the second part in trust, for the uses and purposes named and set forth in said will, and

Whereas, the said testator died leaving an estate consisting of real and personal property, the whole of which was at the time of his decease the community property of said testator and said party of the first part, and

Whereas, after paying the debts of said testator, the family allowance, and the charges and expenses of administration of the estate of said deceased, Richard Donald Girvin, one-half of said community property would go or belong to said party of the first part, and the other half of said community property (less the specific bequests above referred to) would be distributed to said party of the second part as trustee in trust for the uses and purposes set forth and declared in said Will, and

Whereas, said party of the first part wishes all the community property of said estate to fall into the trust created in and by said will except such as may be required to carry out the other provisions of said Will;

Now, Therefore, in consideration of the premises aforesaid and of One Dollar lawful money of the United States of America to her in hand paid by said party of the second part, receipt whereof is hereby acknowledged, said party of the first part has granted, bargained, sold and conveyed and does hereby grant, bargain, sell and convey unto said party of the second part, its successors and assigns as trustees, all the community property or [19] interest of said party of the first part in or to the estate of said Richard Donald Girvin, deceased, which went to, belongs to, or may belong to her, as the surviving spouse of said deceased, to have and to hold in trust, however, for the same uses and purposes of those declared and set forth in said will of said deceased, and for the term therein stated, and as fully and effectually as though said community property or inter-

est of said party of the first, otherwise going to or belonging to her, was and could be devised and bequeathed unto said party of the second part in trust as aforesaid in and by said will, to which a reference is hereby made for further particulars.

In Witness Whereof said party of the first part, on the day and year herein first above written has hereunto and to a duplicate hereof set her hand and seal.

[Seal]

MARGARET EYRE GIRVIN

The Bank of California National Association, a national banking association, the trustee and party of the second part in the foregoing indenture, in consideration of the premises and of the execution of said Indenture, does hereby accept the trusts imposed on it and set forth and declared in said Indenture, and agrees to observe and perform the same, fully and faithfully.

In witness whereof said party of the second part on the day and year in the said Indenture first written has hereunto and to a duplicate hereof caused its corporate name and seal to be affixed by its Vice President thereunto duly authroized.

THE BANK OF CALIFORNIA  
NATIONAL ASSOCIATION

By C. K. McINTOSH,  
Vice-President [20]

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“EXHIBIT No. 2”

I, Richard Donald Girvin, formerly of Menlo Park, County of San Mateo, State of California, United

States of America and now temporarily residing at 21 St. John's Road, Putney Hill in the County of Surrey, England, hereby revoke all former Wills and testamentary dispositions made by me and declare this to be my last will and testament.

1. I appoint The Bank of California, National Association of San Francisco, California, United States of America (hereinafter call "my Trustee") to be the Executors and Trustees of this, my will.

2. I bequeath to my wife, Margaret Eyre Girvin, absolutely (free of duty) all the furniture, jewelry plate, plated articles, china, glass, books, pictures and other articles of household or personal use or ornament of which I may be possessed at my death.

3. I bequeath (free of duty) to my brother Harold Girvin or should he die before me, then to his wife, Maude Girvin, the sum of Two Thousand dollars United States currency to my son Richard Girvin the sum of Five hundred dollars United States currency and to my daughter Lee Girvin Tevis the sum of Five hundred dollars United States currency.

4. I give, devise, bequeath and appoint all my real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of and which I can dispose of by will in any manner I think proper onto my trustee upon trust to sell, call in and convert into money such part thereof as does not consist of [21] money with power to postpone such sale and conversion for such period as my trustees without being liable to account may think proper and out of the proceeds of such sale and conversion and out of my



ready money to pay my funeral and testamentary expenses and just debts.

5. My Trustees shall invest the residue of the said moneys in their name in or upon any duly authorized securities or any securities of a similar nature to any which may be held at my death with power at discretion to change any such investments and shall stand possessed of such investments (including any part of my residuary estate remaining unconverted) hereinafter called the Trust fund and of the annual income thereof upon the trusts following:

6. Upon trust to pay the said income to my wife during her life and after her death to divide the said Trust fund between my said son Richard Girvin and my said daughter Lee Girvin Tevis in such shares and proportions that my said son shall receive and be paid one moiety or equal half part of the said Trust fund less Seven thousand five hundred dollars United States currency and that my said daughter shall receive one moiety or equal half part of the said Trust fund and in addition the Seven thousand five hundred dollars United States currency deducted from my said son's moiety or equal half part of the said Trust fund. Provided that should either of them die in the lifetime of my said wife, leaving issue at her death such issue shall take the share which their parent would have taken and if more than one in equal shares. Provided further that should either of my said [22] children die in the lifetime of my said wife without issue then I direct that on the death of my said wife, the survivor shall take the whole of the said Trust fund absolutely.



7. And I direct that my Trustees shall be entitled to make and be paid all usual and proper charges in and about the conduct of the trust business.

In witness whereof I have hereunto set my hand and seal this thirty-first day of August in the year of our Lord One thousand nine hundred and twenty-two at 198 Upper Richmond Road Putney in the County of Surrey England.

[Seal]                      R. D. GIRVIN

The foregoing instrument was this thirty-first day of August One thousand nine hundred and twenty-two. Signed, sealed, published and declared by the said Richard Donald Girvin to be his last Will and Testament in the presence of each of us the undersigned who thereupon at his request in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses thereof the day and year last above written.

FRANK GALE,

Solicitor.

198 Upper Richmond Road,

Putney S. W. 15

EDMOND J. VINCE,

His Clerk.

[Endorsed]: T. C. U. S. Filed Sept. 18, 1944. [23]

Excerpts from the Testimony of the Proceedings  
Before the Tax Court of the United States in  
the Case of Margaret Eyre Girvin, Deceased,  
The Bank of California, N. A., Executor. Docket  
No. 2396. San Francisco, California, September  
18, 1944.

RICHARD GIRVIN,

called as a witness for and on behalf of the Petitioner,  
having been first duly sworn, was examined and  
testified as follows:

Direct Examination

The Clerk: Please state your full name.

The Witness: Richard Girvin—G-i-r-v-i-n.

By Mr. Julien:

Q. Mr. Girvin, are you the son of Richard Donald Girvin? A. Yes.

Q. And your mother was Margaret Eyre Girvin? A. Yes.

Q. It has been stipulated, Mr. Girvin, that your father died April 5, 1924. On that date how many children did you have?

A. Three.

Q. Are those children living now?

A. Yes.

Q. How many children did your sister, Lee Girvin Tevis have? A. Two.

Q. Are they living now? A. Yes. [24]

Q. Have you any grandchildren, Mr. Girvin?

A. One.

Q. Do you know whether your sister has any grandchildren? A. No.

Mr. Julien: That is all. You may cross examine.

Cross Examination

By Mr. Harpole:

Q. How many children do you have living at this time?      A. Do I have?

Q. Yes.      A. Three.

Q. And your sister has two?      A. Two.

[Endorsed]: T. C. U.S. Filed Oct. 14, 1944. [25]

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PETITIONER'S EXHIBIT No. 1

Schedule G

Transfers During Decedent's Life

(See Instructions on reverse of this sheet)

(1) Did the decedent make any transfer described in the first paragraph (including the six subparagraphs) of the instructions on the reverse of this sheet? (Answer "Yes" or "No."): No.

(2) Did the decedent, within 2 years immediately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No."): No.

(3) Did the decedent, at any time, make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money's worth, but not believed to be includible in the gross estate as indicated in the first paragraph (including the six subparagraphs) of the instructions of this schedule? (Answer "Yes" or "No."): Yes.

(4) If the answer to question (3) is "Yes" state date, amount or value, character of transfer, and motive which actuated the decedent in making the transfer: Community interest of \$90,403.20 in husband's Estate (Richard D. Girvin) conveyed to The Bank of California N.A. Trustee by Agreement dated 6/26/24 to be held by them for the same uses and purposes as those set forth in his will. Return filed for husband's estate 3/25/25. Tax paid on full amount of estate without exemption for community interest.\*

(5) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No."): Yes (the trust referred to in paragraph 4 above.)

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
	Copy of agreement dated 6/26/24 attached.			
Total (also enter under the Recapitulation, Schedule O) .....			\$	\$

Estate of Margaret E. Girvin.

Sheet X

\* This transfer was motivated by the anxiety of Mrs. Girvin to avoid the care and trouble involved in the management of her half of the community property.

[Endorsed]: T.C.U.S. Filed Sept. 18, 1944.

[Title of Tax Court and Cause.]

## MEMORANDUM OPINION

Opper, Judge: Respondent determined a deficiency in estate tax in the amount of \$14,344.29, all of which is in issue. The controversy arises because of respondent's inclusion in the gross estate, under section 811 (c). Internal Revenue Code, of the subject matter of a transfer in trust made by decedent during her lifetime.

The case was submitted upon a stipulation of facts, certain exhibits, and the brief oral testimony of one witness.

The stipulation shows that petitioner's decedent died January 16, 1941, a resident of California, at the age of 78. On June 26, 1924, she created a trust consisting of property which on the date of death had a fair market value of \$97,854.81. No part of this value was included in the estate tax return filed by petitioner. [77]

The trust in question was established shortly after the death of decedent's husband on April 5, 1924. His last will and testament was probated on June 25 of that year. His estate consisted in part of an undivided one-half interest in the community property of the marital community consisting of himself and decedent. The subject matter of the trust created by decedent was her half of that community property.

The husband's will created a trust of which the income was payable to decedent during her life "and after her death to divide the said Trust fund between



my said son Richard Girvin and my said daughter Lee Girvin Tevis in such shares and proportions that my said son shall receive and be paid one moiety or equal half part of the said Trust fund less Seven thousand five hundred dollars \* \* \* and that my said daughter shall receive one moiety or equal half part of the said Trust fund and in addition the Seven thousand five hundred dollars \* \* \*." Upon the death of either child his share was to go to his issue or if none to the survivor.

The trust created by decedent, after referring to the death of her husband and the creation of the trust under his will, appointed the same trustee and transferred to it "all the community property or interest of said party of the first part [decedent] in or to the estate of said Richard Donald Girvin, deceased, [the husband] which went to, belongs to, or may belong to her, as the surviving spouse of said deceased \* \* \* as fully and effectually as though said community property or interest of said party of the first [sic], otherwise going to or belonging to her, was and could be devised and bequeathed unto said party of the second part [the trustee] in trust as aforesaid in and by said will, to which a reference is hereby made for further particulars." [78]

Decedent's will was dated November 7, 1932. After leaving her personal effects, the residue was placed in trust with the same trustee, the income to be paid to her two children for life with the remainders going to the issue of the respective life beneficiaries.

We find the facts to be as stipulated. We make

the further findings that on June 26, 1924, Richard Girvin, decedent's son, had three children, and Lee Girvin Tevis, her daughter, had two children; both children, all five grandchildren, and a great grandchild born subsequently were all alive at the date of the hearing herein.

Respondent's insistence that the transfer in question was made in contemplation of death creates an issue which ordinarily would be treated as predominantly one of fact. *United States v. Wells*, 283 U. S. 102. And the burden of producing the necessary factual proof would rest upon petitioner. *Purrin v. Commissioner* (C. C. A., 7th Cir.), 96 Fed. (2d) 929, certiorari denied, 305 U. S. 626. It is evident, however, from the form and manner of presentation that the parties did not regard themselves as at variance in respect to issues of fact nor anticipate that the disposition of the case would require the consideration of the details of factual background frequently resorted to in contemplation of death cases. Such evidence as there is, including the apparent motive of decedent in creating the trust, her age at the time, and the interval prior to her death have a tendency to suggest the absence of the motive characterizing taxable transfers.

The apparent basis for respondent's conclusion is one which might rather be ascribed to the legal effect of the trust instrument. It is decedent's reference to her husband's death and to her desire to have the trust property dealt with similarly to that which he disposed of by his will [79] upon which he relies. In this we think the attempt must be unsuc-

cessful. The provisions in question make it evident that the trust was created in contemplation of the husband's death and were testamentary in character only as related to his will. But that is far from saying that decedent was contemplating her own death or that she was making what amounted to a disposition in substitution for her own will. That document was prepared some eight years later and in fact did not dispose of her separate property in a manner identical to that established by the trust. The similarity of the latter to the provisions of the husband's will can, we think, have no bearing upon the testamentary character of decedent's own disposition. The single respect in which there might be said to lie some suggestion that decedent's dispositions dealt with contingencies connected with her death was the reservation to herself of the life estate and the provision for the devolution of the property thereafter. But this is a consideration to which we are not permitted to resort in settling such controversies. *May v. Heiner*, 281 U. S. 238.

Though less intensely urged, there is no additional issue as to the applicability of *Helvering v. Hallock*, 309 U. S. 106. On that score it should be sufficient to point out that the reversion to which the estate might be subject—by operation of law and not by force of any provision of the trust itself—could arise only upon decedent's survival of two children and five grandchildren, all of whom were living upon the establishment of the trust. These circumstances make it impossible to view this transfer as intended to take effect at or after decedent's death. *Estate of Benja-*

min L. Allen, 3 T. C. 844; Frances Biddle Trust. 3 T. C. 832; [80] Commissioner v. Kellogg (C. C. A., 3rd Cir.), 119 Fed. (2d) 54; Lloyd v. Commissioner (C. C. A., 3rd Cir.), 141 Fed. (2d) 758. We conclude that no part of the transferred property is includible in decedent's estate.

Decision will be entered for the petitioner.

Entered: Dec. 7, 1944. [81]

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The Tax Court of the United States

Washington

Docket No. 2396

Estate of Margaret Eyre Girvin, Deceased, The  
Bank of California, N. A., Executor,  
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered December 7, 1944, it is



Ordered and Decided: That there is no deficiency in estate tax.

[Seal]      (s) CLARENCE V. OPPER,  
Judge.

Entered December 7, 1944.

Copies served on both parties. [82]

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

Docket No. 2396

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review.

v.

ESTATE OF MARGARET EYRE GIRVIN,  
Deceased, THE BANK OF CALIFORNIA,  
N. A., Executor,

Respondent on Review.

PETITION FOR REVIEW AND  
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John T. Rog-



ers, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

## I.

### JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review, the Bank of California, N. A., (hereinafter referred to as the executor), is a national association organized, created and existing under and by virtue of the laws of the United States with office at 400 California Street, San Francisco, California, and is the duly appointed, qualified and acting executor of the last will and testament of Margaret Eyre Girvin, [83] deceased (hereinafter referred to as the decedent), who died on January 16, 1941, a resident of San Francisco, California; that the estate tax return, made for and on behalf of the decedent's estate, was filed by the executor with the Collector of Internal Revenue for the First Collection District of California, which collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of the Tax Court of the United States pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

## II.

## NATURE OF CONTROVERSY

On June 23, 1943, the Commissioner, in accordance with the provisions of the existing internal revenue laws, advised the executor by registered mail that the determination of the estate tax liability of the decedent's estate disclosed a deficiency of \$14,344.29. Thereafter, on July 14, 1943, the executor filed an appeal from said notice of deficiency with the Tax Court of the United States for a redetermination of said deficiency. The Commissioner duly filed an answer to said petition. This cause came on for hearing before the Honorable Ernest H. Van Possan, Judge of the Tax Court, upon stipulation of facts of the parties, oral and documentary evidence.

The evidence disclosed that on June 26, 1924, the decedent created a trust consisting of property, which on the date of her death, had a fair market value of \$97,854.81. This trust was created shortly after [84] the death of decedent's husband, Richard Donald Girvin, (hereinafter referred to as the husband) who died April 5, 1924, and whose last will and testament was probated on June 25, 1924.

The husband's estate consisted in part of an undivided one-half interest in the community property of the marital community, consisting of himself and decedent. By his will a trust was created of which the income was payable to the decedent for her life, and after her death the property was divided between his son, Richard Girvin, and his daughter, Lee Girvin Tevis. Upon the death of either child in

the lifetime of the decedent leaving issue at her death, such issue should take the share which their parent would have taken, and if more than one, in equal shares. Said will also provided that should either child die in the lifetime of the decedent without issue, then upon the decedent's death the survivor should take the whole of said trust fund.

By the trust instrument of June 26, 1924, the decedent transferred to the trustee named therein, who was also the trustee in the trust created by the husband's will, all of her community property or interest in or to the estate of the husband which went to, belongs to, or may belong to her, as the surviving spouse of the husband, for the same uses and purposes as those declared and set forth in the husband's will and for the term therein stated.

On June 26, 1924, the decedent's son had three children, and her daughter had two children; both children, all five grandchildren and a great grandchild born subsequently, were all alive at the date of the hearing herein before the Tax Court. [85]

In its Memorandum Opinion entered December 7, 1944, the Tax Court held that the transfer in trust on June 26, 1924, was not a transfer of property intended to take effect at or after the decedent's death within the meaning of Section 811 (c) of the Internal Revenue Code. On the same day the Tax Court entered its decision ordering and deciding that there is no deficiency in estate tax.

## III.

## ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of the Tax Court of the United States in this proceeding, hereby petitions for a review of the said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Tax Court which are relied upon by the Commissioner as the basis of this petition for review are as follows:

The Tax Court of the United States erred:

1. In holding and deciding that the trust created by decedent on June 26, 1924, was not a transfer of property intended to take effect in possession or enjoyment at or after the decedent's death.

2. In failing to hold and decide that said transfer in trust on June 26, 1924, was a transfer testamentary in character and was not intended to take effect in possession or enjoyment until at or after decedent's death. [86]

3. In failing to hold and decide that the beneficiaries of said trust of June 26, 1924, had contingent remainders therein and would take their respective shares of trust property only upon the condition that they survived the decedent.

4. In failing to hold and decide that the decedent had a reversionary interest by operation of law in the property of said trust of June 26, 1924, which rever-



sionary interest remained until her death, and that the beneficiaries' interest therein remained contingent until decedent's death.

5. In that its decision is contrary to the law and to the regulations and is not supported by substantial evidence.

6. In ordering and deciding that there is no deficiency in estate tax.

7. In failing to order and decide that there is a deficiency in estate tax in the amount of \$14,344.29.

Wherefore, the Commissioner petitions that said opinion and decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, Jr., CAR  
Assistant Attorney General

(Sgd.) J. P. WENCHEL, CAR  
Chief Counsel, Bureau of Internal Revenue,  
Attorneys for Petitioner on Review.

Of Counsel:

JOHN T. ROGERS,  
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Mar. 1, 1945. [87]



[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To: Allen G. Wright, Esq., Edward Hale Julien,  
Esq., 1010 Mills Building, San Francisco, Cali-  
fornia.

You are hereby notified that the Commissioner of Internal Revenue did, on the first day of March, 1945, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this first day of March, 1945.

(Signed) J. P. WENCHEL, CAR

Chief Counsel, Bureau of In-  
ternal Revenue.

Attorney for Petitioner on  
Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of March, 1945.

(Signed) ALLEN G. WRIGHT,

(Signed) EDWARD HALE JULIEN,

Attorneys for Respondent on  
Review.

[Endorsed]: T.C.U.S. Filed Mar. 19, 1945. [88]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To: S. V. Beckwith, Jr., The Bank of California,  
N. A., Executor, Estate of Margaret Eyre  
Girvin, Deceased, 400 California Street, San  
Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the first day of March, 1945, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this first day of March, 1945.

(Signed) J. P. WENCHEL, CAR

Chief Counsel, Bureau of In-  
ternal Revenue.

Attorney for Petitioner on  
Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review

and assignments of error mentioned therein, is hereby acknowledged this 6th day of March, 1945.

S. V. BECKWITH, Jr.,

Assistant Trust Officer for Bank of California, N.

A., Executor, Estate of Margaret Eyre Girvin,  
Deceased.

[Endorsed]: T.C.U.S. Filed Mar. 19, 1945. [89]

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[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON

Now Comes the Commissioner of Internal Revenue, the Petitioner on Review in the above-entitled cause, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In holding and deciding that the trust created by decedent on June 26, 1924, was not a transfer of property intended to take effect in possession or enjoyment at or after the decedent's death.

2. In failing to hold and decide that said transfer in trust on June 26, 1924, was a transfer testamentary in character and was not intended to take effect in possession or enjoyment until at or after decedent's death.

3. In failing to hold and decide that the beneficiaries of said trust of June 26, 1924, had con-

tingent remainders therein and would take their respective shares of trust property only upon the condition that they survived the decedent.

4. In failing to hold and decide that the decedent had a reversionary interest by operation of law in the property of said trust of June 26, 1924, which reversionary interest remained until her death, and that the beneficiaries' interest therein remained contingent until decedent's death.

5. In that its decision is contrary to the law and to the regulations and is not supported by substantial evidence.

6. In ordering and deciding that there is no deficiency in estate tax.

7. In failing to order and decide that there is a deficiency in estate tax in the amount of 014,-344.29.

(Signed) SAMUEL O. CLARK, Jr., CAR  
Assistant Attorney General.

(Signed) J. P. WENCHEL, CAR  
Chief Counsel, Bureau of Internal Revenue.  
Attorneys for Petitioner on Review.

Service of a copy of the within Statement of Points to be relied on is hereby admitted this 22nd day of May, 1945.

ALLEN G. WRIGHT and  
EDWARD HALE JULIEN,  
Attorneys for Respondent on Review.

[Endorsed]: T.C.U.S. Filed June 15, 1945. [91]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,  
PROCEEDINGS, AND EVIDENCE TO BE  
CONTAINED IN RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings before the Tax Court:

(a) Petition, together with attached Exhibit A (Notice and Statement of Deficiency).

(b) Answer.

3. Stipulation of Facts, together with exhibits referred to therein and attached thereto.

4. The following portions of the transcript of the proceedings before the Tax Court on September 18, 1944; beginning with Line 11, Page 6, and ending with Line 19, Page 7.

5. The following exhibits introduced in evidence at said hearing: Petitioner's (taxpayer's) Exhibit 1 and Respondent's (Commissioner's) Exhibit A.

6. Memorandum Opinion of the Tax Court entered December 7, 1944.

7. Decision of the Tax Court entered December 7, 1944.



8. Petition for Review, together with proof of service of notice of filing petition for review and service of a copy of petition for review.

9. Statement of Points to be relied upon.

10. Any and all orders made by the Court with respect to the enlargement of time for the preparation, transmission and filing of the record on review, not included in record.

11. This Designation of Portions of Record, Proceedings, and Evidence to be contained in Record on Review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) SAMUEL O. CLARK, Jr., CAR  
Assistant Attorney General.

(Signed) J. P. WENCHEL, CAR  
Chief Counsel, Bureau of Internal Revenue.  
Attorneys for Petitioner on Review.

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted and agreed to this 22 day of May, 1945.

ALLEN G. WRIGHT and  
EDWARD HALE JULIEN,  
Attorneys for Respondent on Review.

[Endorsed]: T.C.U.S. Filed June 15, 1945. [93]

The Tax Court of the United States

Washington

Docket No. 2396

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

v.

ESTATE OF MARGARET EYRE GIRVIN,  
Dec'd., THE BANK OF CALIFORNIA, N.  
A., Executor,

Respondent.

## CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 93, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of June, 1945.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the  
United States.

[Endorsed]: No. 11088. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. The Bank of California, National Association, Executor of the Estate of Margaret Eyre Girvin, Deceased, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 2, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11088

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

v.

ESTATE OF MARGARET EYRE GIRVIN, De-  
ceased, THE BANK OF CALIFORNIA, N.  
A., Executor,

Respondent.

DESIGNATION OF RECORD FOR PRINTING

Pursuant to Rule 19 (6) of the rules of this Court, the Commissioner-petitioner hereby designates for printing the entire transcript of record as filed and

transmitted to this Court by the Clerk of the Tax Court except taxpayer's Exhibit 1 and Commissioner's Exhibit A, being the exhibits mentioned in item 5 of the designation directed to the Clerk of the Tax Court. Those exhibits are not considered necessary for the hearing of the cause.

Dated July 23, 1945.

SAMUEL O. CLARK, Jr.,  
Assistant Attorney General,  
Attorney for Petitioner.

[Endorsed]: Filed July 28, 1945. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY RESPONDENT OF ADDITIONAL PART OF RECORD FOR PRINTING

Pursuant to Rule 19 (6) of the rules of this Court, the respondent in the above entitled appeal, having received on July 30, 1945, by mail a copy of the Designation of Record for Printing, submitted by the Petitioner in said appeal, does hereby designate for printing the following additional part of the transcript of record as filed and transmitted to this Court by the clerk of the Tax Court, to wit:

All of the Sheet X of the Taxpayer's Exhibit 1, (except the reverse side of said Sheet X), being Schedule G of the Taxpayer's Federal Estate Tax return.

The matter on the face of said Schedule G of said Taxpayer's Exhibit so designated as an additional part of the record for printing is considered material and necessary for the hearing of the cause.

Dated: July 30th, 1945.

ALLEN G. WRIGHT,  
EDWARD HALE JULIEN,  
Attorneys for Respondent.

[Endorsed]: Filed August 1, 1945. Paul P.  
O'Brien, Clerk.





No. 11088

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**COMMISSIONER OF INTERNAL REVENUE, PETITIONER**

*v.*

**THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,  
EXECUTOR OF THE ESTATE OF MARGARET EYRE GIRVIN,  
DECEASED, RESPONDENT**

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**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE PETITIONER**

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**SAMUEL O. CLARK, Jr.,**  
*Assistant Attorney General.*

**SEWALL KEY,  
HELEN R. CARLOSS,  
L. W. POST,**

*Special Assistants to the Attorney General.*

---

**FILED**

**DEC 2 - 1925**

**PAUL P. O'BRIEN,**  
**CLERK**



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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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No. 11088

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,  
EXECUTOR OF THE ESTATE OF MARGARET EYRE GIRVIN,  
DECEASED, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE PETITIONER**

---

**OPINION BELOW**

The memorandum opinion of the Tax Court (R. 29-33) is not officially reported.

**JURISDICTION**

This case involves estate tax. The Commissioner's notice of deficiency (R. 10-14) was mailed to the taxpayer on June 23, 1943 (R. 4, 15). Within ninety days thereafter, and on July 14, 1943, the taxpayer filed its petition with the Tax Court for redetermination under Section 272 of the Internal Revenue Code. (R. 1, 3-14.) The decision of the Tax Court that

there is no deficiency in estate tax was entered December 7, 1944. (R. 2, 33-34.) The case is brought to this Court by petition for review, filed March 1, 1945 (R. 2, 34-42), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

#### QUESTION PRESENTED

Whether a transfer in trust made by the decedent in 1924 was intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811 (c) of the Internal Revenue Code where she reserved the income for life and there was also a possibility that the corpus would revert to her or her estate by operation of law.

#### STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set out in the Appendix, *infra*, pp. 15-17.

#### STATEMENT

The Tax Court found the following facts (R. 29-31):

The decedent died January 16, 1941, a resident of California, at the age of seventy-eight. On June 26, 1924, she created a trust consisting of property which on the date of death had a fair market value of \$97,854.81. No part of this value was included in the estate tax return filed by her executor, the taxpayer herein. (R. 29.)

The trust in question was established shortly after the death of decedent's husband on April 5, 1924. His last will and testament was probated on June 25 of that year. His estate consisted in part of an un-

divided one-half interest in the community property of the marital community consisting of himself and decedent. The subject matter of the trust created by decedent was her half of that community property. (R. 29.)

The husband's will created a trust under the terms of which the income was payable to the wife, this decedent, during her life and after her death the trust fund was to be divided between his son Richard and his daughter Lee in such shares and proportions that the son should receive one moiety or equal half part of the trust fund less seven thousand five hundred dollars and that the daughter should receive one moiety or equal half part of the trust fund and in addition the seven thousand five hundred dollars. It was also provided that should either of the children die in the lifetime of the wife, this decedent, leaving issue at her death such issue should take the share which their parent would have taken; and it was further provided that should either of the children die in the lifetime of the wife, this decedent, without issue then on the death of the wife the survivor should take the whole of the trust fund. (R. 24, 29-30.)

The trust created by decedent, after referring to the death of her husband and the creation of the trust under his will, appointed the same trustee and transferred to it her one-half interest in the community property upon the same terms as stated in the husband's will with respect to his trust. (R. 30.)

On June 26, 1924, Richard Girvin, decedent's son, had three children, and Lee Girvin Tevis, her daughter, had two children; both children, all five grandchildren,

and a great grandchild born subsequently were all alive at the date of the hearing in the Tax Court. (R. 31.)

The Commissioner included the value of the property of the trust created by the decedent in her gross estate and upon review the Tax Court held such action erroneous. (R. 33.)

#### STATEMENT OF POINT TO BE URGED

The essential error to be urged as ground for reversal is the failure of the Tax Court to hold that the principal of the trust established by the decedent on June 26, 1924, should be included in the gross estate under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

#### SUMMARY OF ARGUMENT

The Tax Court was plainly wrong in holding that the instant transfer was not intended to take effect in possession or enjoyment at or after the grantor's death. The grantor reserved the income for life and there was also a possibility that the corpus would revert to her or her estate by implication of law if she survived the remaindermen designated in the trust indenture. In the circumstances, the determination of the ultimate possession or enjoyment of the property was delayed until at or after the decedent's death and it was not until then that absolute and complete dominion was or could be acquired by the remaindermen. The decedent's death enlarged and matured the interests of the beneficiaries and the transfer is accordingly taxable.



## ARGUMENT

**The corpus of the trust should be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death**

The Tax Court's opinion was rendered on December 7, 1944, which was prior to the decisions of the Supreme Court in *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113; and *Goldstone v. United States*, decided June 11, 1945 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,209). These cases clarify and interpret *Helvering v. Hallock*, 309 U. S. 106, in such a way as to indicate clearly that transfers such as the instant one are taxable under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) as transfers intended to take effect in possession or enjoyment at or after the grantor's death.<sup>1</sup>

In *Fidelity Co. v. Rothensies*, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, utilizing the principles set forth in *Klein v. United States*, 283 U. S. 231, and *Helvering v. Hallock*, *supra*, held the

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<sup>1</sup> Since this trust was created in 1924, we are not here relying upon the amendments of 1931 and 1932 relating specifically to the retention of income for life; those amendments operate prospectively only. *Hassett v. Welch*, 303 U. S. 303.



full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111-112):

It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering v. Hallock, supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property

was includible in his gross estate under Section 302 (c). In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 116):

The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (c). In so holding the Court took the view that the

wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determination of the ultimate possession or enjoyment of the property, the transfer was taxable.

It will be noted that in deciding the foregoing cases the Court did not undertake to draw any distinction between express reversions on the one hand and implied reversions on the other. Indeed, the language of the opinions indicates clearly that none should be made. Thus in *Fidelity Co. v. Rothensies*, *supra*, where there was an express reservation of a contingent power of appointment but no express provision with respect to the possibility of the decedent's surviving her daughters and their descendants, the Court treated as relevant the consequences that would flow in that case from such survival. This demonstrates, we submit, that for the practical purposes of the estate tax a possibility of reversion by implication of law is just as effective as one expressly retained. The applicable regulation (Section 81.17 of Treasury Regulations 105 (Appendix, *infra*)) is in harmony with this view, providing, as it does, that it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer.

With these principles in mind, there seems little doubt as to the taxability of the instant transfer. Here the decedent not only retained the income for life but there was also a possibility that the trust property would revert to her or her estate by implication of

law if she survived all the remaindermen designated in the trust instrument. Restatement, Trusts (1935), Sec. 411; Restatement, Trusts, Cal. Ann. (1940), Sec. 411; *Estate of Steele*, 124 Cal. 533; *Estate of Hamon*, 136 Cal. App. 517; *United States v. Tonkin*, 150 F. 2d 531 (C. C. A. 3d), petition for certiorari pending. Indeed, that possibility was recognized in the opinion of the Tax Court in the instant case. (R. 32.) And since the possibility of reversion existed at the time of the decedent's death, and the interests of the beneficiaries were enlarged and matured by such death, we submit that this transfer is plainly within the scope of the statute.

The instant case is quite similar to *Eldredge v. Rothensies*, 150 F. 2d 23 (C. C. A. 3d), petition for certiorari pending, which was decided in favor of the Government. It is true that there the settlor expressly reserved a contingent power of appointment over the corpus, while here the reversionary interest results from operation of law, but we submit for the reasons given above that this distinction is immaterial.

In reaching its decision in the instant case the Tax Court, relying upon *Commissioner v. Kellogg*, 119 F. 2d 54 (C. C. A. 3d); *Lloyd's Estate v. Commissioner*, 141 F. 2d 758 (C. C. A. 3d); *Estate of Allen v. Commissioner*, 3 T. C. 844; and *Frances Biddle Trust v. Commissioner*, 3 T. C. 832, took the view that a remote possibility of reversion by operation of law is unimportant in determining whether the statute is applicable. To the extent that the Kellogg case may be thought to support that view, we submit that it is out of harmony with the principles enunciated in the



Supreme Court cases cited above, and should, therefore, be disregarded. Indeed, the Third Circuit in its more recent opinion in the *Eldredge* case, *supra*, said that insofar as any expressions in the *Kellogg* opinion may be in any way inconsistent with the *Fidelity Co.* case, *supra*, they must be taken to be overruled.

The other three cases relied upon by the Tax Court (*Lloyd's Estate v. Commissioner, supra*; *Estate of Allen v. Commissioner, supra*; and *Frances Biddle Trust v. Commissioner, supra*) are distinguishable. In those cases the grantor did not reserve the income for life<sup>2</sup> and the provisions for distribution of the corpus were made without reference to his death. In the circumstances the grantor's death did not have enough effect upon the ultimate possession or enjoyment of the trust property to make the transfer taxable. Although appeals were at first filed in the *Biddle* and *Allen* cases to protect the interests of the Government, the Solicitor General has now reconsidered the matter and authorized the dismissal of the appeals. It is readily apparent that the situation in the instant case is materially different; under the terms of this trust the remaindermen did not and could not acquire full and complete dominion over the property until the grantor died. Cf. *Mullikin v. Magruder*, 149 F. 2d 593 (C. C. A. 4th). The grantor's death ripened and en-

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<sup>2</sup> Although the retention of a life interest *alone* can not be made the basis for taxability prior to the 1931 amendment to the statute (see footnote 1, *supra*), it may nevertheless be a relevant consideration, which, taken together with other facts of the case, render the transfer one intended to take effect in possession or enjoyment at or after death.



larged the interests of the remaindermen, and it is clear that their rights were conditioned upon survivorship in a very real sense and within the meaning of Section 81.17 of the Treasury Regulations.

It is interesting to note that the Tax Court has recently changed its views as regards this type of case and held in a situation quite similar to the one here presented that there was a taxable transfer. *Estate of Leaman v. Commissioner*, 5 T. C. No. 84.

The taxpayer may rely upon *United States v. Brown*, 134 F. 2d 372, where under circumstances comparable to those here presented this Court held the transfer non-taxable. But that case was decided in February, 1943, which was some two years prior to the recent Supreme Court decisions. This Court in the *Brown* case expressed the view that the trust arrangement was a palpable substitute for a will but felt that under the Supreme Court cases as they then stood the transfer was not taxable. The latest utterances of the Supreme Court have now clarified the matter and there is no doubt that where, as here, the decedent had the income for life plus a string upon the corpus, the transfer is taxable.

The taxpayer may refer to *Central Hanover Bank & Trust Co. v. United States*, 58 F. Supp. 565 (C. Cls.). In that case the grantor had created a trust to pay the income to herself for life and upon her death to pay the principal to her three children and the survivor or survivors in equal shares, but if any of the children predeceased her and left issue surviving, such issue were to receive the share of their parent. There was no provision in the trust agreement with respect

to the disposition of the corpus in the event that the grantor should survive the three children and their issue. The court originally held (57 F. Supp. 497), correctly, we submit, that the retention by the grantor of the income for life together with the possibility that the corpus might revert to her if she survived the beneficiaries made the transfer taxable under *Helvering v. Hallock*, *supra*. But thereafter the taxpayer made a motion for a new trial, which was granted, and the decision was changed (58 F. Supp. 565, *supra*), one judge dissenting.

The majority opinion takes the view that if the grantor had survived her children and their issue, it is doubtful under the New York law, which governed the construction of the trust instrument, whether the trust property would have reverted to her by operation of law or would have gone upon her death to the heirs of the survivor of the children and their issue. The court further says that in any event they are satisfied that she thought she was completely disposing of the property, save only for the reserved life interest, when she created the trust and since this was her intention the transfer could not be considered as one intended to take effect in possession or enjoyment at her death.

We submit that this decision and the reasoning underlying it are patently erroneous. In the first place the taxpayer has the burden of proof as to local law where that is pertinent (*Helvering v. Fitch*, 309 U. S. 149, 156; *Helvering v. Leonard*, 310 U. S. 80, 86), and if he fails to carry it clearly and convincingly, the case should be decided in the Government's

favor. Moreover, it is thought that there is little basis for the court's doubt, for it is the general rule that where a trust fails for want of beneficiaries the property will revert to the grantor or his estate by implication of law and this is also the rule in New York (*Newton v. Hunt*, 134 App. Div. 325, 334, affirmed, 201 N. Y. 599; *Doctor v. Hughes*, 225 N. Y. 305), as well as in California (*Estate of Steele, supra*; *Estate of Hamon, supra*). Furthermore, the Court of Claims seems to have drawn out of thin air its conclusion that the grantor could not have intended the transfer to take effect in possession or enjoyment at or after her death. She retained the income for life and also a contingent reversionary interest in the corpus, thus holding in suspense and delaying until death or thereafter the ultimate possession or enjoyment of the trust property. In the circumstances, nobody except the grantor could actually enjoy the economic benefits from the property until after the grantor died, and we submit that her executor was without standing to urge that she did not intend the result which was actually achieved. Finally, the Court of Claims erred in making its decision turn upon the grantor's subjective intention. The test is not a subjective one; it is essentially objective, and has been so treated in all of the Supreme Court cases.

A similar case is now pending in the Third Circuit on appeal by the Commissioner from the Tax Court's decision in *Estate of Church v. Commissioner*, decided December 4, 1944 (1945 P-H T. C. Memorandum Decisions, par. 45, 134). A similar point is involved in *Estate of Gallois v. Commissioner*, 4 T. C. 840, appeal

to this Court now pending, No. 11080, present term.

In light of the foregoing considerations we submit that the decision of the Tax Court is unsound and at variance with the principles stated in the governing Supreme Court decisions.

#### CONCLUSION

The decision of the Tax Court should be reversed.  
Respectfully submitted.

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NOVEMBER 1945.



## APPENDIX

### Internal Revenue Code:

#### SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

\* \* \* \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \* (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

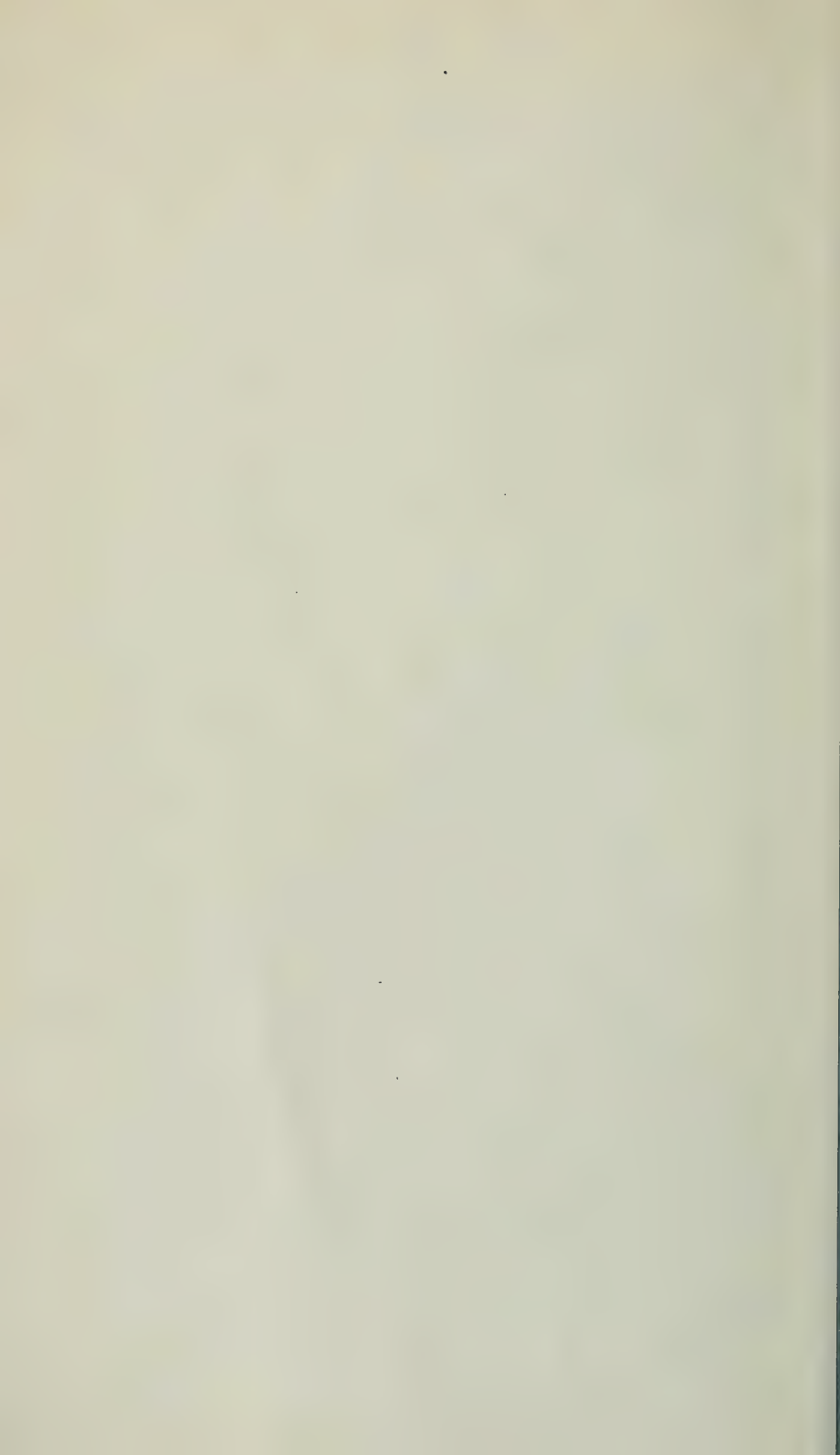
SEC. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, “a transfer \* \* \* intended to take effect in possession or enjoyment at or after his death,” includes



a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining

the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of section 81.11, adjustments in the values of such transferred estates may be required. (See section 81.15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering v. St. Louis Union Trust Co.* (296 U. S. 39) and *Becker v. St. Louis Union Trust Co.* (296 U. S. 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering v. Hallock* and companion cases (309 U. S. 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein v. United States* (283 U. S. 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.



No. 11,088

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

VS.

THE BANK OF CALIFORNIA, NATIONAL ASSO-  
CIATION, Executor of the Estate of Mar-  
garet Eyre Girvin, Deceased,

*Respondent.*

On Petition for Review of the Decision of the Tax Court  
of the United States.

**BRIEF FOR RESPONDENT.**

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FILED

JUL 8 - 1940

PAUL P. O'BRIEN,  
CLERK





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No. 11,088

IN THE  
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COMMISSIONER OF INTERNAL REVENUE,  <i>Petitioner,</i>  VS.  THE BANK OF CALIFORNIA, NATIONAL ASSO- CIATION, Executor of the Estate of Mar- garet Eyre Girvin, Deceased,  <i>Respondent.</i>
---

On Petition for Review of the Decision of the Tax Court  
of the United States.

**BRIEF FOR RESPONDENT.**

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**I. THE ISSUE.**

The question before this court is whether this case is governed by *May v. Heiner*, 281 U. S. 238, 50 Sup. Ct. 286, and *United States v. Brown*, 134 Fed. (2d) 372, decided by this court in 1943, or whether it comes within *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444, *Fidelity Co. v. Rothensies*, 324 U. S. 108, 65 Sup. Ct. 508, *Commissioner v. Estate of Field*, 324 U. S. 113, 65 Sup. Ct. 511 and *Goldstone v. United States*, 325 U. S. ....., 65 Sup. Ct. 1323, as claimed by the petitioner.

## II. THE ARGUMENT.

### 1. ANALYSIS OF THE INSTANT TRUST.

Shortly after the death of her husband, the decedent in 1924 created a trust of her half of the community property in which she transferred that property to the respondent bank, as trustee, upon the same terms as stated in her husband's will. By the terms of the husband's will the trustee bank was to convert the whole estate into money and invest and reinvest the same in certain securities and to stand possessed of such investments referred to as the trust fund and of the annual income therefrom, upon trust "to pay the said income to my wife, during her life and after her death to divide the said trust fund between my said son Richard Girvin and my said daughter Lee Girvin Tevis" in certain unequal shares, "provided that should either of them die in the lifetime of my said wife leaving issue at her death such issue shall take the share which their parent would have taken and if more than one in equal shares. Provided further that should either of my said children die in the lifetime of my said wife without issue, then I direct that on the death of my said wife, the survivor shall take the whole of the said trust fund absolutely". (R. 23, 24.)

By virtue of the terms of the father's will for a conversion of the estate into money, the trust which followed was necessarily one of personal property.

By virtue of the terms of the testamentary trust and of the trust deed of the respondent's testatrix such legal title passed to the trustee as was necessary

to enable the trustee to execute the trust. (*Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629.) Obviously that legal title so passing to the trustee was the legal ownership thereof so as to enable the trustee to divide that property between the children upon the wife's death. The legal estate had vested in the trustee in 1924 and an equitable estate at the same time in the unequal shares referred to in the father's will had vested in Richard Girvin and Lee Girvin Tevis and remained so vested up to and including the death of the life tenant in the trust. (*Title Insurance & Trust Co. v. Duffill*, *supra*.)

In the *Duffill* case the mother of Harry Duffill had created a testamentary trust in certain of her property with certain of the income therefrom to be paid to Harry Duffill, until his son should reach the age of 21 years, at which time one half of the *corpus* of this trust property was to be transferred and conveyed to Harry Duffill.

Commenting upon Section 863 of the California Civil Code, the court, in the *Duffill* case said at page 648:

“It has been construed by this court many times, and the conclusion has been firmly established that ‘the estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust’.”

The court, again in the *Duffill* case, said at pages 648 and 649:



“In *Gray v. Union Trust Co.*, 171 Cal. 637, 640 (154 Pac. 306, 308), a substantive ‘equitable estate’ was recognized to exist in one who had a ‘usufructuary interest in the whole estate during her life’, notwithstanding there was ‘conveyed to the trustee the whole legal title, since so much (was) plainly necessary for the purpose of the trust (Civ. Code, Sec. 863),’ which general purposes were to give the trustor the beneficial use of the property during her life, and upon her death to see that the property went to her nominees under her will.”

And the court, in this *Duffill* case concluded on page 649 as follows:

“It were useless, we feel, to carry this discussion to greater length, or to discuss other phases of the matter and probable lines of solution of the problem here presented. Harry Duffill was vested with an equitable estate and beneficial interest in his mother’s property immediately upon her death, with only such legal title lodged in the Los Angeles Trust and Savings Bank as is required for the execution of the testamentary trust. That this interest was assignable is beyond controversy.”

This *Duffill* case has been since followed with approval in *Lynch v. Cunningham*, 131 Cal. App. 164, 168 et seq. where the court said at page 172, that the court in the *Duffill* case:

“held that, as to the entire *corpus* of the trust, real as well as personal, Harry Duffill had a present vested equitable interest”.

In this case, therefore, while the testatrix in this estate of Margaret Eyre Girvin, deceased, had, under

the terms of her husband's will and under the terms of her own deed to the Bank of California N. A. as trustee, an equitable life estate or interest in the trust fund, created by that will and her deed, and while the trustee held the legal title to that trust fund, her two children Richard Girvin and Lee Girvin Tevis had present vested equitable estates or interests in said trust fund of so real and substantial a character, as to be assignable in their mother's lifetime.

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## 2. MAY v. HEINER.

The circumstances of this trust, bring the case squarely within the principles of *May v. Heiner* and *U. S. v. Brown*, supra. Upon Richard Donald Girvin's death in 1924 the legal title to one-half of the community property, subject to probate administration vested in the Bank of California N. A. as trustee under his will and an equitable estate therein vested in Richard Girvin and Lee Girvin Tevis, his sister. Upon the transfer effected in 1924 by the deed of Margaret Eyre Girvin creating a trust of her half of said community property, the legal title thereto vested in the Bank of California N. A. as trustee and an equitable estate therein vested in her son Richard Girvin and her daughter Lee Girvin Tevis. There was no part of this trust fund left in her estate to pass on to any one on her death. The possibility of a reverter is after all a mere possibility and a mere possibility is not an interest in property, or any interest of any kind any more than is the expectancy of an heir.

(California Civil Code, Section 700.) A mere possibility of reverter cannot be transferred. (California Civil Code, Section 1045.)

In *May v. Heiner*, supra, the settlor, Pauline May, wife of Barney May by instrument dated October 1, 1917 transferred certain bonds, notes, corporate stocks and moneys to certain trustees in trust to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance to Barney May during his lifetime, and after his decease to pay such balance to Pauline May during her lifetime, and after her decease all the property in said trust, after paying certain expenses of the trust, was to be distributed equally among her four children, their distributees or appointees.

This transfer, the court declared,

“was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.” (281 U. S., page 243, 50 Sup. Ct. 287.)

The decision of the court was that this trust fund formed no part of the gross estate of Mrs. May and was therefore not taxable as such under the Revenue Act of 1918, Sections 401 and 402.

At no time has the Supreme Court expressly overruled this case of *May v. Heiner*.

## 3. U. S. v. BROWN.

In *U. S. v. Brown*, supra, Brown in 1923 created an irrevocable trust whereby he transferred to himself and his two sons as trustees certain shares of stock then owned by him. Brown in that case like Mrs. Girvin in this case made no provision for reversion of any part of the *corpus*. During the lives of Brown and his wife and the survivor of them the income was to be paid in certain proportions to Brown, his wife and their three children. The trust was to terminate upon the death of the survivor of Brown and his wife. Thereupon the *corpus* of the trust was to vest absolutely in equal shares in their three children, or their issue and spouses in certain proportions or in the absence of issue or spouse of any child his share went to the surviving children or their issue and spouses. This trust was in force at the time of Brown's death in 1923 and terminated with the death of his wife in 1940.

The commissioner in the *Brown* case as in this case (Brief, p. 5) conceded that in view of *Hassett v. Welch*, 303 U. S. 303, 58 Sup. Ct. 559, he was not relying upon the amendments of 1931 or 1932 which operated prospectively only. But the commissioner in the *Brown* case claimed that Brown had made a transfer by trust "which was intended to take effect in possession or enjoyment at or after his death" within the meaning of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendments of 1931 and 1932, which is substantially his position in this case. Section 811(c) of the Internal Revenue Code to



which the petitioner refers in his brief (p. 2) is Section 302(c) of the Revenue Act of 1926, as modified by the prospectively operating amendments of 1931 and 1932. (Joint Resolution of March 3, 1931, Ch. 454, 46 Stat. 1516 and Section 803(a) Revenue Act of 1932.)

On the authority of *May v. Heiner*, supra, which this court recognized in 1943 was then the law, this court decided that the Brown trust fund was not taxable as part of his gross estate.

“As late as 1938”,

this court said in the *Brown* case, at page 373 in 134 Fed. (2d):

“the court in *Hassett v. Welch*, supra, appears to have regarded *May v. Heiner* as subsisting authority. The court did not expressly or by necessary implication overrule it in *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444. In the *Hallock* case the court fixed upon the provision for a reversion of the *corpus* as the ‘string’ warranting the inclusion under sect. 302(c) of the assets transferred in trust. There is here no string.”

This court, today, we respectfully suggest stands in the same position it occupied in 1943 in deciding the *Brown* case. So far as anything has been said by our Supreme Court *May v. Heiner*, supra, is still the law. The recent cases in the Supreme Court cited by counsel for the petitioner all exhibit the presence of “strings” such as were the warrant for the decision in *Helvering v. Hallock*, supra.



## 4. THE RECENT CASES IN THE SUPREME COURT.

In *Fidelity Co. v. Rothensies*, 324 U. S. 108, 65 Sup. Ct. 508, the settlor in 1928 transferred certain property in trust to pay the income to the settlor during her life and at her death to his two daughters (aged 12 and 10 in 1928) during their lives. At the death of each daughter the *corpus* supporting her share of the income was to be paid to her descendants. If either daughter died without leaving surviving descendants the *corpus* of her share was to be added to the share of the other daughter. But if both daughters died without leaving surviving descendants, the *corpus* was to be paid to such persons as the settlor might appoint by will. In default of such appointment, the *corpus* was to go to certain named charities.

The reservation of this power of appointment, furnished "the string" warranting the taxability of the assets so transferred in trust, a power which the settlor exercised in a will made in 1930. The settlor died four years later.

In this case the court said:

"The courts below, utilizing the principles set forth in *Klein v. United States*, 283 U. S. 231, 51 Sup. Ct. 398 and *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444, correctly held that the decedent's transfer in trust in 1928 was one intended to take effect in possession or enjoyment at or after death within the meaning of section 302(c) of the Revenue Act of 1926, prior to the amendments of 1931 and 1932."

And later the court, in this case said:

“Only at or after her death was it certain whether the property would be distributed under the power of appointment or as provided in the trust instrument. \* \* \* Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total *corpus* of the trust. The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent’s property subjected the value of the entire *corpus* to estate tax liability.”

No such a string was reserved by Mrs. Girvin in the case now at the bar of this court.

It will be noted that in the *Fidelity Co.* case the court did not expressly overrule the case of *May v. Heiner*, supra, and Mr. Justice Douglas in his concurring opinion in the *Fidelity Co.* case declared:

“So in this case, as in *Commissioner v. Field*, 324 U. S. 113, 65 Sup. Ct. 511, we are not faced with the question whether *May v. Heiner*, 281 U. S. 238, 50 Sup. Ct. 286, should survive *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444.”

In *Commissioner v. Estate of Field*, 324 U. S. 113, 65 Sup. Ct. 511, the settlor in 1922 transferred to a trustee certain assets in trust to pay the income during his life to the settlor unless the trust should terminate before his death. The term of this trust was to be measured by the lives of two nieces and the survivor of them, unless terminated earlier. If the

settlor died during the continuance of the trust leaving issue, the income during the remaining trust period was to be paid to such issue, subject to a right reserved to the settlor to make changes by will or otherwise as to the interests of such issue. If, however, the trust terminated during the life of the settlor the *corpus* of the trust was to be paid over to him. The settlor at no time had any issue and he died in 1937. The trust was in force throughout the life of the settlor, but at the settlor's death, if he died without any issue surviving, the *corpus* of the trust was then to go to a surviving sister of the settlor and to the surviving issue of a deceased brother.

The court in this case said:

"The trust here was limited in duration to the lives of the decedent's two nieces. But if both nieces died before the decedent, the *corpus* would have been paid to the decedent \* \* \*. Thus until decedent's death it was uncertain whether any of the *corpus* would pass to the beneficiaries or whether it would revert to the decedent."

The possible reversion here referred to was obviously that reserved by the settlor in the trust instrument itself, for the court continues:

"Decedent retaining a string attached to all the property until death severed it, the entire *corpus* was swept into the gross estate and was taxable accordingly."

Again in concurring in this decision Mr. Justice Douglas expressly said that whether *May v. Heiner*,

supra, is still the law was not determined by this decision. Referring to *May v. Heiner*, he says:

“If the trust gave a life estate to the decedent and the remainder to his children, section 302(c) of the 1926 Act would not require the payment of a tax under the rule of *May v. Heiner* \* \* \*. The theory of *May v. Heiner* was that under those circumstances no interest in the property passed from the grantor to the remainderman on the grantor's death, since the title of the remainderman had been definitely fixed by the trust deed. We need not determine whether the rule of *May v. Heiner*, supra, should survive *Helvering v. Hallock*, supra. \* \* \* For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the *corpus* would have returned to the grantor if he survived his neices. Hence it seems plain that the gifts over would take effect in possession or enjoyment only at or after the death of the grantor.”

In *Goldstone v. United States*, 325 U. S. ....., 65 Sup. Ct. 1323 the question as stated by the court was whether the proceeds of certain insurance contracts payable upon the death of the decedent to his wife were includible in his gross estate for estate tax purposes under section 302(c) as amended (Sect. 811(c) Internal Revenue Code.)

In 1933 the Equitable Life Assurance Society of the U. S. issued two contracts for which the decedent paid sums aggregating \$26,500.00.

(a) One contract insured decedent's life for \$18,928.00 for a single premium of \$14,357.08 payable



upon death to his wife, if living, and otherwise to his daughters, and if all the beneficiaries predeceased the deceased the proceeds of the policy were to be paid to his executors or administrators. In lieu of a physical examination the decedent was required to take out a second or an annuity contract;

(b) The other contract, an annuity in consideration of a single premium of \$12,142.92 provided for semi-annual payments of \$386.51 to be made to decedent during his life and for the payment upon his death of \$6,071.46 to his wife, if living, otherwise to his daughters, or if they were dead to his estate.

The decedent was 63 years old when the contracts were issued on June 29, 1933, and he died in 1939 leaving his wife and daughter surviving.

These two contracts, considered together, upon the authority of *Helvering v. Le Gierse*, 312 U. S. 531, 61 Sup. Ct. 646 were said to contain none of the true elements of insurance risk, and that section 302(g) of the Revenue Act of 1926, as amended (Sect. 811(g) of Internal Revenue Code), relating to amounts receivable "as insurance under policies taken out by decedent upon his own life" was therefore inapplicable.

"The sole question, then," said the court, "is whether proceeds of the contracts are includible in the decedent's gross estate under section 302(c) as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. That question we answer in the affirmative."



This *Goldstone* case was governed by the provisions of sect. 302(c) of the Revenue Act of 1926 as amended by the Resolution of 1931 and the Revenue Act of 1932, and has no bearing on the case at the bar of this court which is governed by the provisions of sect. 302(c) of the Revenue Act of 1926 as they read prior to the amendment of 1931. Furthermore in the *Goldstone* case the decedent in those contracts had reserved to his estate a contingent reversionary interest in the entire proceeds of both contracts, a fact which distinguishes it from the case at bar where no reversionary interest whatsoever was provided for. The following language of the court in the *Goldstone* case shows the important bearing of this reserved contingent reversionary interest upon the court's decision:

“The decedent, in making disposition of \$25,000.00 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters the proceeds of the two contracts would automatically have been payable to his estate when he died. *Thus the ultimate disposition of the proceeds of the contracts was suspended until the moment of decedent's death.* Only then did

the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival."

And later the court says:

"The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death delaying until then the determination of the ultimate possession or enjoyment of the property."

Heretofore, we have positively contended that *May v. Heiner*, in the Supreme Court, and *United States v. Brown*, in this court, are still good law and lay down the rule which determines on the *facts* of the instant case, that the decision of the Tax Court should be affirmed for the taxpayer.

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#### 5. COMMENT UPON PETITIONER'S PETITION.

Meeting the Commissioner's brief head-on we come to page 5. The *Fidelity Co.* and *Estate of Field* cases *expressly except* from their decision a disturbing of the rule in *May v. Heiner*. (See concurring opinion Mr. Justice Douglas.) The *Goldstone* case on its facts was so wide of the question in the case at bar that *May v. Heiner* was not even mentioned. However, one may find extremely interesting the reasoning of the dissent of Mr. Justice Roberts, concurred in by Mr. Justice Douglas, in the *Goldstone* case.

The point we would emphasize here is, just how misleading is petitioner's language in page 5 of his

brief that: “These cases *clarify and interpret Helvering v. Hallock*, \* \* \* in such a way as to indicate clearly that the transfers such as the instant one are taxable \* \* \*”. What follows to page 9 of his brief is merely wishful thinking.

Petitioner’s lack of fairness in his statements becomes increasingly apparent as he proceeds in his argument. At page 9 commissioner states: “The instant case is *quite similar* to *Eldridge v. Rothensies* \* \* \*”. There, however, decedent expressly *retained* the contingent power to dispose of the *corpus by will*. We find it *quite dissimilar* to the case before this court.

More patently on page 11 appellant states: “It is interesting to note that the Tax Court has *recently changed its views as regards this type of case* and held in a situation *quite similar* to the one here presented that there was a taxable transfer. *Estate of Leaman v. Commissioner*, 5 T.C. No. 84.” (See C.C.H. Dec. 14735, decided *September 11, 1945*.) There, the facts were that the *corpus* was payable to life tenant or decedent’s then (at death) *surviving children*. In this *Girvin* case the living children were named beneficiaries on the creation of the trust. How false the conclusion that the Tax Court has “recently changed its views” may be distilled not only from the *Leaman* case itself but also from the more recent case of *Estate of F. M. Singer*, T. C. Memo, C.C.H. decision 14820(m) *decided October 3, 1945*. There the facts do square with the *Girvin* case. And the Tax Court held, in an extremely well reasoned opinion, that there was no taxable transfer. Judge Mur-

dock, in fact, said (p. 22615), "The decedent had five children all of whom had passed their 21st birthdays while the decedent was still alive. \* \* \* Thus *there was no uncertainty until the death of the decedent as to just who would take and what the share of each would be.* \* \* \* The only case which he (commissioner) cites in support of this contention (uncertainty until death of decedent life tenant) is *Fidelity Philadelphia Trust Co. et al., Executors (Stinson Estate) v. Rothensies.* \* \* \* However, the *decedent in that case had not surrendered all control over the property.* She retained the power to name other takers by her will in case those named in the trust instrument should not survive her (cf. *Leaman* case). There was an uncertainty in that case until the decedent died as to whether she had disposed of the property at all by the transfer in trust. The decedent in the present case had *completely disposed* of the property by the transfers and appointments. There was no uncertainty as to whether he had disposed of it by those instruments or whether he might make some further disposition of the remainder interests to other persons altogether. (Citing cases. \* \* \*)"

And farther on Judge Murdock said: "However, the decedent's death was *not* the 'intended event' which enlarged the estate of the nominees or any of them. He had disposed of his property about as completely as could be expected and it should not be included in his gross estate under Section 811(c) \* \* \* (citing cases.)" (Emphasis ours.)

The foregoing discussion of the *Leaman* and *Singer* cases hardly calls for further comment on our oppo-



ment's logic to say the very least. Nor would it seem appropriate to dignify petitioner's contentions as regards *United States v. Brown* and the *Central Hanover Bank* cases, p. 11 et seq. It requires no Herculean feat of the mind to conclude that we not only "may" but do rely on the *Brown* case in this Circuit.

At the bottom of page 13, appellant states: "A similar case is now pending in the Third Circuit on appeal by the commissioner from the *Tax Court's* decision in *Estate of Church* \* \* \*. A similar point is involved in *Estate of Gallois* \* \* \*, appeal to this court (C.C.A. 9) now pending \* \* \*." Judge Denman has since (November 16, 1945) written the opinion affirming the judgment of the Tax Court for commissioner. But the *Gallois* case, *on its facts* is far from "similar" to the case now before this court. The limitation in the *Gallois* trust instrument was that *any part of the corpus might* be applied by the trustees for benefit of life tenant. Also, the trustor was a trustee, life tenant and decedent!

The *Estate of Church*, on the other hand, does come close to the *Girvin* case on its facts. There the Tax Court as here held for the taxpayer. What the Third Circuit will do with the *Church* case is not hard to guess. It is the Third Circuit which decided *Commissioner v. Kellogg*, 119 Fed. (2d) 54 in favor of taxpayer. In the *Brown* case the Ninth Circuit followed on a parity of reasoning.

The cases of *Estate of Hamon*, 136 Cal. App. 517 and *Estate of Steele*, 124 Cal. 533 cited by petitioner have no application to the issues in this case.



What the petitioner is really asking of this court is (a) that it overrule itself in the *Brown* case and thereby create a probable conflict with the Third Circuit and that (b) it refuse to follow *May v. Heiner*, when the Supreme Court, itself, still declines to say that *May v. Heiner* is no longer the law of the land, but on the contrary elaborately distinguishes from it such cases as *Helvering v. Hallock* and those cited here by the petitioner.

Upon what ground does the petitioner make such a request of this court? Upon the ground that in construing tax laws, all doubts are to be resolved in favor of the taxing government? Or upon the ground that, in applying the practicable problems of tax law to the taxpayer, substance and actualities are to be thrown in the discard, in favor of mere possibilities without interest, or other imaginary shadows, void of everything except hope, provided their use, if sanctioned, might net more revenue.

We suggest that the petitioner has presented no good reason why this court in this case should overrule *U. S. v. Brown* or disregard *May v. Heiner*. We suggest further that, under these circumstances, the decision of the Tax Court, in this case, should be affirmed.

Dated, San Francisco,  
January 2, 1946.

Respectfully submitted,  
ALLEN G. WRIGHT,  
EDWARD HALE JULIEN,  
*Attorneys for Respondent.*



No. 11,088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

VS.

THE BANK OF CALIFORNIA, NATIONAL ASSO-  
CIATION, Executor of the Estate of Mar-  
garet Eyre Girvin, Deceased,

*Respondent.*

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BRIEF OF AMICI CURIAE IN SUPPORT OF  
RESPONDENT'S PETITION FOR A REHEARING.

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*Amici Curiae.*

FILED

MAY 21 1946

PAUL P. O'BRIEN,  
CLERK



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COMMISSIONER OF INTERNAL REVENUE,

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---

**BRIEF OF AMICI CURIAE IN SUPPORT OF  
RESPONDENT'S PETITION FOR A REHEARING.**

---

*To the Honorable Francis A. Garrecht, Presiding  
Judge, and to the Honorable Associate Judges of  
the United States Circuit Court of Appeals for  
the Ninth Circuit:*

We appear in this case as *amici curiae* and respectfully urge this Court to grant respondent's petition for a rehearing herein on the grounds hereinafter stated.

## REASONS FOR APPEARANCE.

Our interest in the instant case arises from the fact that we are attorneys for the plaintiff executor in two cases pending in the United States District Court for the Northern District of California, Southern Division, in each of which the facts are substantially the same as those involved in the instant case, and in each of which the decision will in all probability be controlled by the decision in the instant case. These two cases are: LeRoy F. Krusi, as Executor of the Will of Ida M. Krusi, Deceased, v. United States, No. 25786-R, and LeRoy F. Krusi, as Executor of the Will of Hermann Krusi, Deceased, v. United States, No. 25787-R.

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## ARGUMENT IN SUPPORT OF PETITION.

1. We believe that the Court is in error in stating, in the last paragraph of its opinion, that there appears to be "no distinction between the acquisition of the power to create a reversion in the settlor by a retained interest to be exercised by the settlor, after the deaths of all those holding the remainder interest, as in the *Fidelity* case, *supra*, and a reversion by operation of law arising from such deaths." The distinction is, in our opinion, that where the settlor has specifically provided in the trust instrument for retained powers or a retained interest it is apparent that the transfer was one "*intended to take effect in possession or enjoyment at or after \* \* \* death*" (*italics ours*). In the absence of such a specific provision in the trust instru-

ment the settlor's intention must be determined by factual matters outside the trust instrument, such as the degree of remoteness, at the time of creation of the trust, of the failure of the entire line of beneficiaries. Where the settlor's intention is shown by the express provisions of the trust instrument, the degree of remoteness of the contingency under which the corpus might return to the settlor is immaterial, because the trust instrument itself reveals the settlor's intention.

That the settlor's intention should not be implied because of a remote possibility that the trust corpus might return to the settlor by operation of law has been well expressed by Judge Littleton\* in his concurring opinion in *Central Hanover Bank & Trust Co. v. United States*, 58 Fed. Supp. 565 (Ct. Cls., 1945), as follows:

“\* \* \* the transfer when made was absolute and irrevocable, and any possibility of reversion to the grantor through the prior death of the named beneficiaries, including their issue, *was too remote to justify the taxing authorities implying an intention* on the part of the donor to reserve a reversionary interest of such a character as would justify the Government in including the value of the trust property in the gross estate for the purpose of the excise tax upon a transfer ‘*intended to take effect in possession or enjoyment at or after death*’ within the meaning of the taxing act.

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\*Judge Littleton was one of the original members of the Board of Tax Appeals, now The Tax Court of the United States, and its Chairman from April 1927 to November 1929, when he was appointed to the Court of Claims.

I think the rule announced in *Helvering v. Hallock*, 309 U. S. 106, *where a reversionary interest was explicitly retained, should not be extended by implication and without proof that such was the intention of the donor.*" (Italics ours.)

The decisions of the Supreme Court in *Fidelity Co. v. Rothensies*, 324 U. S. 108, and *Commissioner v. Field*, 324 U. S. 113, cited in the Court's opinion in the instant case, are not in conflict with the view here expressed. In both cases the Court *first* determined that the decedent's express retention of a string over all the trust property justified its inclusion in the gross estate. In the *Fidelity* case the Court expressed its conclusion on this point as follows (p. 111):

"Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. The *retention of such a string*, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, *subjected the value of the entire corpus to estate tax liability.*" (Italics ours.)

In the *Field* case the trust expressly provided that upon termination the corpus was to be paid to the decedent. The Court justified the inclusion of the trust property in the gross estate in the following language (p. 115):

"The trust here was limited in duration to the lives of the decedent's two nieces. *But if both nieces died before the decedent, the corpus would have been paid to the decedent rather than to the*



*beneficiaries named in the trust instrument (in this instance the decedent's sister and the issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.*" (Italics ours.)

Having determined in both cases that the decedent's *express* retention of a string brought the trust property within the gross estate, the Court next turned to a consideration of the *measure of the tax*, and it was in this connection that the Court expressed its opinion that the probability of the property returning to the decedent was immaterial. Thus in the *Fidelity* case the Court said (pp. 111-112):

"It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant *to the measurement of estate tax liability*. The application of this tax does not depend upon 'elusive and subtle casuistries'. *Helvering v. Hallock*, *supra*, 118. No more should the *measure of the tax* depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. \* \* \* The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency *is the measure of the tax*." (Italics ours.)

And the statement in the *Field* case, at page 116, that  
 “It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent’s reversionary interest”

was made in considering the question of the *measure* of the tax.

In both the *Fidelity* case and the *Field* case, therefore, the Supreme Court first pointed out that the decedent had retained in the trust instrument a string over the corpus of the trust and that this justified the inclusion of the corpus in the gross estate as a transfer intended to take effect at death. The Court then held in both cases that the full value of the corpus of the trust should be included in the gross estate and that the degree of remoteness of the contingency under which the property might have returned to the decedent is immaterial for the purpose of measuring the tax. In both cases the lower courts had held that the transfer was intended to take effect at death. The only question involved was whether the entire value of the corpus of the trust should be included in the gross estate. These two cases are authority for the proposition that where the decedent has expressly retained in the trust instrument a string over the property, the entire value of the trust corpus must be included in the decedent’s estate. They do not support the proposition that the mere possibility that the trust corpus might return to the decedent by

operation of law is sufficient to justify the imposition of the tax.

In two cases decided since the decision of the Supreme Court in the *Fidelity* case and the *Field* case the Circuit Court of Appeals for the Second Circuit has passed upon the exact question involved in the instant case and has held that the possibility that the trust corpus might return to the settlor by operation of law does not justify the imposition of the tax. These two cases are *Commissioner v. Irving Trust Co.*, 147 Fed. (2d) 946 (March 5, 1945), and *Commissioner v. Hall*, 153 Fed. (2d) 172 (January 16, 1946). In both cases the Government relied upon the *Fidelity* case and the *Field* case, but the Court said that these cases did not require a contrary holding.

Following the decision of the Supreme Court in *Helvering v. Hallock*, 309 U. S. 106 (1940), the Government took to the courts numerous cases involving the retention of a life interest on the part of the settlor of a trust (but in which a string over the corpus was not expressly reserved in the trust instrument), in an effort to obtain a decision that *May v. Heiner*, 281 U. S. 238, had been overruled.\*

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\*Omitting District Court and Tax Court decisions, these cases are: *Commissioner v. Hall*, 153 Fed. (2d) 172 (Jan. 16, 1946) (CCA 2); *Central Hanover Bank & Trust Co. v. United States*, 58 Fed. Supp. 565 (Ct. Cls., 1945); *Commissioner v. Irving Trust Co.*, 147 Fed. (2d) 946 (CCA 2, 1945); *Helvering v. Proctor*, 140 Fed. (2d) 87 (CCA 2, 1944); *United States v. Brown*, 134 Fed. (2d) 372 (CCA 9, 1943); *New York Trust Co. v. United States*, 51 Fed. Supp. 733 (Ct. Cls., 1943); *Commissioner v. Kellogg*, 119 Fed. (2d) 54 (CCA 3, 1941).

In every one of these cases the decision went against the Government. But in every one of these cases there existed the possibility that the trust corpus might return to the settlor by operation of law. Yet such possibility was not considered sufficient to justify a holding that the transfer was one *intended* to take effect at death. No case has been found which holds that the mere possibility that the corpus might return to the settlor by operation of law is a transfer intended to take effect at death, with the exception of the first decision of the Court of Claims in *Central Hanover Bank & Trust Co. v. United States*, 57 Fed. Supp. 497 (1944), which was withdrawn and changed to a decision that the transfer was not intended to take effect at death (58 Fed. Supp. 565 (1945)).

If the possibility that the trust corpus might return to the settlor by operation of law is sufficient to subject the trust corpus to tax, no matter how remote the contingency, every trust created prior to the 1931 amendment to section 302(c) of the 1926 Act reserving the life income to the settlor with remainders to specified individuals will be subject to tax, and the question whether *May v. Heiner*, 281 U. S. 238, has survived *Helvering v. Hallock*, 309 U. S. 106, would become moot. But that this is not the case is clearly indicated by the concurring opinion of Mr. Justice Douglas in the *Field* case, 324 U. S. at pages 116-117, where he states:

“If the trust gave a life estate to the decedent and the remainder to his children, Sec. 302(c) of the 1926 Act would not require the payment



of a tax under the rule of *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Co.*, 283 U.S. 782; *McCormick v. Burnet*, 283 U. S. 784, and *Hassett v. Welch*, 303 U. S. 303. \* \* \* We need not determine whether the rule of *May v. Heiner* should survive *Helvering v. Hallock*, 309 U. S. 106. See Paul, *Federal Estate & Gift Taxation* (1942) Sec. 7.15. For in this case the grantor retained the right to reduce or cancel by will or written instrument the interests of the children; and the corpus would have been returned to the grantor if he survived his nieces."

And in *United States v. Brown*, 134 Fed. (2d) 372 (CCA 9, 1943), this Court said (page 373):

"Decision of the case necessarily turns on the inquiry whether *May v. Heiner*, supra, is presently the law. The current of decisions has doubtless encompassed *May v. Heiner*, but we are in no position to hold that the tide has overturned it. It would be fruitless to undertake a review of the cases touching one way or another on this subject. As late as 1938 the court, in *Hassett v. Welch*, supra, appears to have regarded *May v. Heiner* as subsisting authority. The court did not expressly or by necessary implication overrule it in *Helvering v. Hallock*, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A.L.R. 1368. In the *Hallock* case the court fixed upon the provision for a reversion of the corpus as the 'string' warranting the inclusion, under Sec. 302(c) of the assets transferred in trust. *There is here no string; at least there is none appearing in the trust indenture itself, although it may be theoretically possible for a state of facts to arise which*



*would defeat the trust. Accordingly, the judgment below must stand on the authority of May v. Heiner."* (Italics ours.)

2. The Tax Court determined that "the reversion to which the estate might be subject \* \* \* could arise only upon decedent's survival of two children and five grandchildren, all of whom were living upon the establishment of the trust. *These circumstances make it impossible to view this transfer as intended to take effect at or after decedent's death.*"\* This is the equivalent of a finding by the Tax Court that the settlor did not intend the transfer to take effect at or after her death. This suggests the application of *Dobson v. Commissioner*, 320 U. S. 489, in which the Supreme Court held that uniform and expeditious tax administration requires that the decisions of the Tax Court be given all credit to which they are entitled under the law, saying (page 501):

"\* \* \* all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have 'warrant in the record' and a reasonable basis in the law. But 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" (Citing cases.)

---

\*Incidentally, the Tax Court did not hold that there was no possibility that the corpus would return to the settlor during her lifetime, as stated in the opening sentence of this Court's opinion.

and again (page 502):

“\* \* \* when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand.”

Perhaps this Court intended to suggest, on page 2 of its opinion, that the Tax Court had made a clear-cut mistake of law in failing to consider Sec. 81.17 of Treasury Regulations 105. But, as shown in the preceding paragraph of the opinion, the Tax Court cited in support of its opinion the leading Tax Court case on this subject, *Francis Biddle Trust*, 3 T. C. 832, in which the regulation (Art. 17 of Reg. 80, which is the same in all material respects as Sec. 81.17 of Reg. 105) is set forth in full. It cannot be said, therefore, that the Tax Court has failed to consider the regulation.

Wherefore, it is respectfully urged that respondent's petition for a rehearing may be granted.

Dated, San Francisco, California,

May 10, 1946.

Respectfully submitted,

LEON de FREMERY,

MORRISON, HOHFELD, FOERSTER,

SHUMAN & CLARK.

*Amici Curiae.*

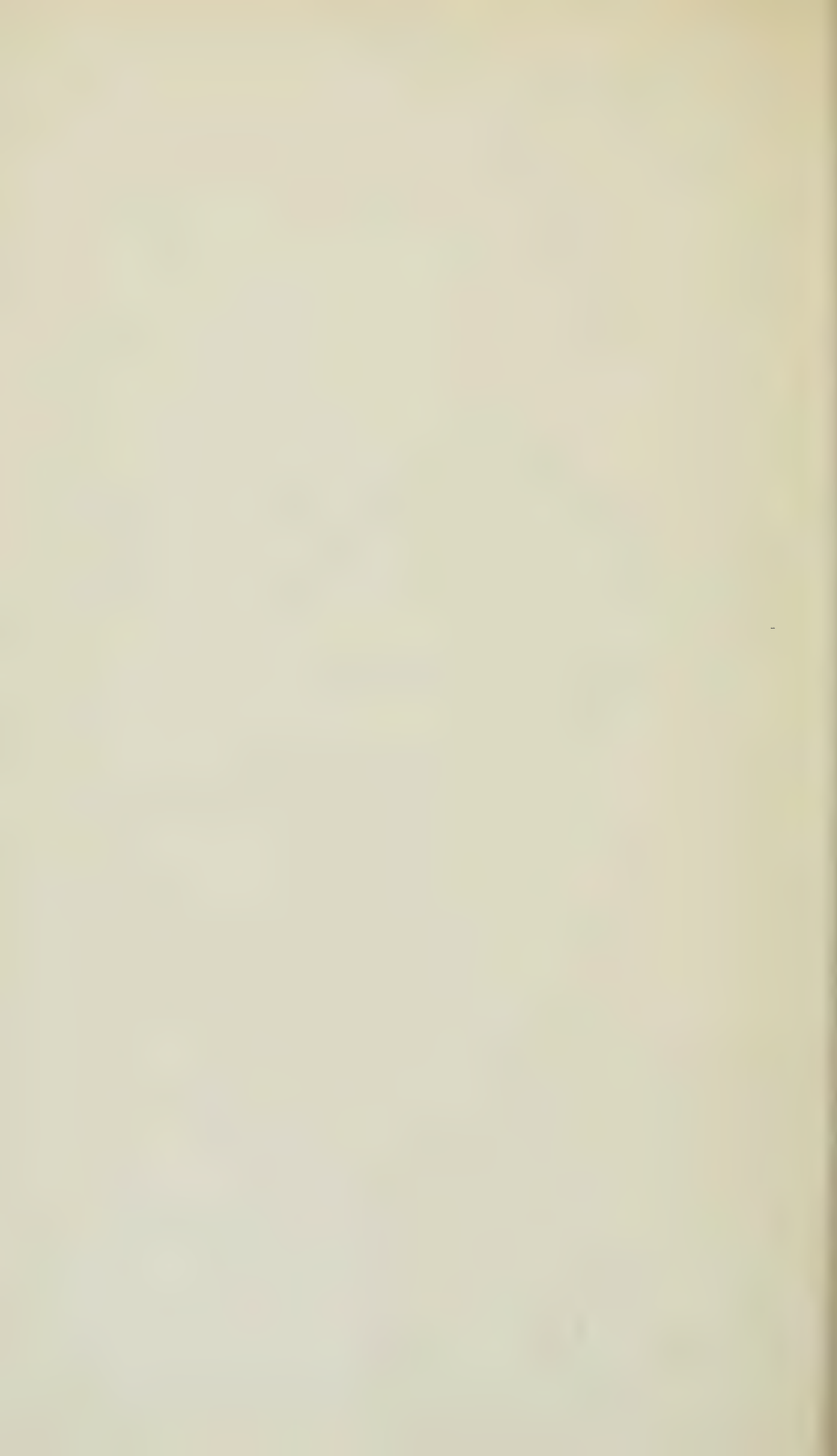


CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing brief in support of respondent's petition for rehearing is well founded and that said petition is not interposed for delay.

Dated, San Francisco, California,  
May 10, 1946.

LEON de FREMERY,  
*Of Counsel for Amici Curiae.*





No. 11,088

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

VS.

THE BANK OF CALIFORNIA, NATIONAL ASSO-  
CIATION, Executor of the Estate of Mar-  
garet Eyre Girvin, Deceased,

*Respondent.*

On Petition for Review of the Decision of the Tax Court  
of the United States.

PETITION OF RESPONDENT FOR A REHEARING.

---

ALLEN G. WRIGHT,  
Mills Building, San Francisco 4,

EDWARD HALE JULIEN,  
Mills Building, San Francisco 4,

*Attorneys for Respondent.*

FILED

MAY 11 1948

PAUL P. O'BRIEN



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No. 11,088

IN THE  
**United States Circuit Court of Appeals**  
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---

COMMISSIONER OF INTERNAL REVENUE,

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THE BANK OF CALIFORNIA, NATIONAL ASSO-  
CIATION, Executor of the Estate of Mar-  
garet Eyre Girvin, Deceased,

*Respondent.*

On Petition for Review of the Decision of the Tax Court  
of the United States.

**PETITION OF RESPONDENT FOR A REHEARING.**

---

*To the Honorable Francis A. Garrecht, Presiding  
Judge, and to the Honorable Associate Judges of  
the United States Circuit Court of Appeals for  
the Ninth Circuit:*

Now comes The Bank of California National Association Executor of the Estate of Margaret Eyre Girvin, deceased, respondent in the above entitled proceeding, by its attorneys, Allen G. Wright and Edward Hale Julien and respectfully shows:



## I.

**REQUEST FOR REHEARING.**

The aforesaid respondent seeks and hereby petitions for a rehearing of the issues in the above entitled proceeding and of the decision and judgment of this Honorable Court thereon rendered in said proceeding on the 11th day of April, 1946.

---

## II.

**GROUND'S FOR REHEARING.**

The grounds for requesting said rehearing are that this Honorable Court, it is respectfully suggested, has erred in its decision and judgment as follows:

1. In erroneously assuming or concluding that the decision of the Supreme Court in *May v. Heiner*, 281 U. S. 238, 50 Sup. Ct. 286, has been overruled by the Supreme Court either expressly or by necessary implication, or otherwise.

2. In erroneously assuming or concluding that the facts of the instant case are not in all essentials substantially similar to the facts in said case of *May v. Heiner*, or that they do not bring it within the compass of that case.

3. In erroneously assuming or concluding that there were no distinctions of substance between the facts in such cases as *Klein v. United States*, 283 U. S. 231, 51 Sup. Ct. 398; *Helvering v. Hallock*, 309 U. S.

106, 60 Sup. Ct. 444; *Fidelity Co. v. Rothensies*, 324 U. S. 108, 65 Sup. Ct. 508; *Commissioner v. Field*, 324 U. S. 113, 65 Sup. Ct. 511, on the one hand and *May v. Heiner*, supra; *Hassett v. Welch*, 303 U. S. 303, 58 Sup. Ct. 508; *Commissioner v. Kellogg*, 119 Fed. (2d) 54; *U. S. v. Brown*, 134 Fed. (2d) 372; *Commissioner v. Irving Trust Co.*, 147 Fed. (2d) 946, and the instant case on the other hand, such as would justify an affirmance of the decision herein of the tax court; and

4. In erroneously assuming or concluding that those provisions of section 81.17 of Treasury Regulations 105 upon which said court relied in justification of its decision herein applied to the trust in the instant case, created prior to the amendments of 1931 and 1932 to the Revenue Act of 1926.

---

### III.

#### ARGUMENT.

The respondent respectfully suggests that the trust created in this case in 1924 is indistinguishable from the trust in *May v. Heiner*, supra, and that the trust in this case, like the trust in *May v. Heiner*, having been made prior to the amendments in 1931 and 1932 to section 203(c) of the Revenue Act of 1926 (Joint Resolution of March 3, 1931, Ch. 454, 46 Stat. 1516; Revenue Act of 1932, section 803(c)) is governed by the law as declared in *May v. Heiner* (*Hassett v.*

*Welch*, 303 U. S. 303, 58 Sup. Ct. 559), and not by the law as amended since 1931 or 1932.

*Commissioner v. Irving Trust Co.*, 147 Fed.

(2d) 946, Circuit Court of Appeals for the Second District.

The respondent suggests further that while the provisions of section 81.17 of Treasury Regulations 105 may justify the inclusion in the gross estate of a decedent, for purposes of assessing an estate tax, the *corpus* of a trust created subsequently to the 1931 and 1932 amendments to section 203(c) of the Revenue Act of 1926, where the decedent has reserved a life estate in the trust property, those provisions are not intended to apply to such a trust when created prior to the said 1931 and 1932 amendments. If, on the contrary, the Commissioner by the provisions aforesaid intended to make them applicable to such a trust as that in the present case, he is flouting *May v. Heiner*, and attempting by regulation to accomplish a purpose not authorized to him by law.

The Supreme Court has twice declared, once in 1930 and again in 1938, that the *corpus* of such a trust as that in the instant case, cannot, for purposes of the estate tax, be included in the gross estate of the deceased settlor where the trust was created prior to the aforesaid amendments of 1931 and 1932 to the Revenue acts (*May v. Heiner*, supra, and *Hassett v. Welch*, supra). The Supreme Court has not expressly overruled either *May v. Heiner* or *Hassett v. Welch*. The respondent suggests that, as this court itself

said, in *United States v. Brown*, supra, the Supreme “court did not expressly or by necessary implication overrule it (*May v. Heiner*) in *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444.” If the Supreme Court did not overrule *May v. Heiner* in *Helvering v. Hallock* it did not overrule *May v. Heiner* in *Klein v. United States*, supra, or in *Fidelity Co. v. Rothensies*, supra, or *Commissioner v. Field*, supra. In all of these cases there was present the “string” attached to the trust conveyance by the settlor that in the opinion of the Supreme Court justified the tax and gave to the instrument a testamentary character and the so-called “string” was more than a “mere possibility” it was in each case something of substance, not quite as tenuous as the term “string” might suggest. A reversion is an estate, a thing of substance.

Mrs. Girvin had no reversion in the instant case either in her lifetime or at the date of her death.

A right to amend or revoke a trust or a reserved power of appointment or the retention of a reversion, under certain conditions, would give to a transfer in trust an ambulatory quality that would justify regarding it as testamentary in character. But the transfer in trust in the case of *May v. Heiner*, said the court in that case, was not testamentary in character and neither was Mrs. Girvin’s transfer in trust testamentary in character. A possibility of reverter, if any, in the case of *May v. Heiner* as in this case did not pass to the living upon the death of the settlor in either case. Mrs. Girvin’s children did not



acquire a possibility of a reverter upon their mother's death. As the Supreme Court properly and accurately described it in *May v. Heiner*, "The interest therein which she possessed immediately prior to her death was obliterated by that event." And in the case of Mrs. Girvin as in the case of Pauline May, to quote again from the court in *May v. Heiner*, at her death, "no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed."

When Mrs. Girvin's deed was executed in 1924 the entire legal title to the property vested in her trustee, The Bank of California N. A. (Sec. 863 California Civil Code.) Equitable estates in remainder at the same time vested in Richard Girvin and his sister Lee Girvin Tevis (*Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629), subject only to possible divestiture in the event of the death of either in the lifetime of Mrs. Girvin. As they both outlived their mother, the equitable estates vested in them in 1924 were on her death no longer subject to divestiture in favor of their respective issue.

It is still conceivable that the Supreme Court has properly hesitated to declare that such a tax exaction as the Commissioner claims here could apply to any trust created prior to the 1931 and 1932 amendments to the Revenue Act of 1926, unless something of real rather than fancied substance could be found as a justification, some "string" like an express provision for a reversion, or the reservation of a power of appointment, or of amendment or revocation, fairly im-



pressing the original transfer with a testamentary character. In the *Klein* and *Hallock* cases the reversions were expressly provided for in the instrument creating the trust, in the *Fidelity* case a power of appointment was reserved which could change the beneficiaries taking upon the expiration of the life estate and in the *Field* case there was expressly reserved a power of appointment and a reversion.

Unless the Supreme Court has in effect overruled *May v. Heiner* and *Hassett v. Welch*, it is again respectfully suggested that this court is in error in its recent decision of the instant case.

The Supreme Court takes pride in distinguishing itself from the British House of Lords, by asserting that unlike that House, it "has from the beginning rejected a doctrine of disability at self correction." (*Helvering v. Hallock*, supra, at p. 121.) If the court had felt any inconsistency between its decisions in the *Hallock* case or in the *Fidelity Co. or Field* cases relied upon by the Government in this case and its decisions in *May v. Heiner* and *Hassett v. Welch*, it would, in all probability, have announced that those decisions were no longer the law. If there is any doubt about the construction of a taxing statute that doubt, on the authority of the Supreme Court, should be resolved in favor of the taxpayer and not in favor of the Government. (*Hassett v. Welch*, supra, and cases there cited.)

Much as the Congress may have disliked the decision in *May v. Heiner*, by their aforesaid amend-

ments of 1931 and 1932 to the Revenue Act of 1926 the Congress did not attempt anything other than a prospective operation therefor. Had the Congress intended otherwise they knew how to word their legislation to effect their object, as witness the following provisions in Section 402(c) of the Revenue Act of 1918, which read:

“To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer is made or created before or after the passage of this Act*) except in case of a bona fide sale for a fair consideration in money or money's worth.” (Emphasis ours.)

The Congress by confining the effect of said amendments of 1931 and 1932 to a prospective operation only, accepted the construction of the Revenue Law in *May v. Heiner*. Can it be expected that the Supreme Court will now overrule *May v. Heiner* and thus effect by judicial legislation what Congress refrained from attempting? The doubt as to such a decision on the part of the Supreme Court is, it is suggested, at least a reasonable one.

Finally attention is invited to the case of *Commissioner v. Irving Trust Co.*, supra, a case whose facts are substantially similar to the instant case and where the trusts reserving income for life to settlor were created prior to the 1931 and 1932 amendments to the Revenue Act of 1926. In that case the court found

these trusts not includible in the gross estate of the decedent settlor for estate tax purposes and found nothing in *Fidelity-Philadelphia Trust Co. v. Rothensies*, supra, inconsistent with its position.

In conclusion it is suggested that the factor of taxability in the instant case is governed by the provisions of Section 302 (c) and (d) of the Revenue Act of 1924 and not by the provisions of I.R.C., Section 811 (c) and that it is not governed by any treasury regulations which grew out of later statutes and which are not warranted or authorized by the Revenue Act of 1924.

Dated, San Francisco,  
May 6, 1946.

Respectfully submitted,  
ALLEN G. WRIGHT,  
EDWARD HALE JULIEN,  
*Attorneys for Respondent.*



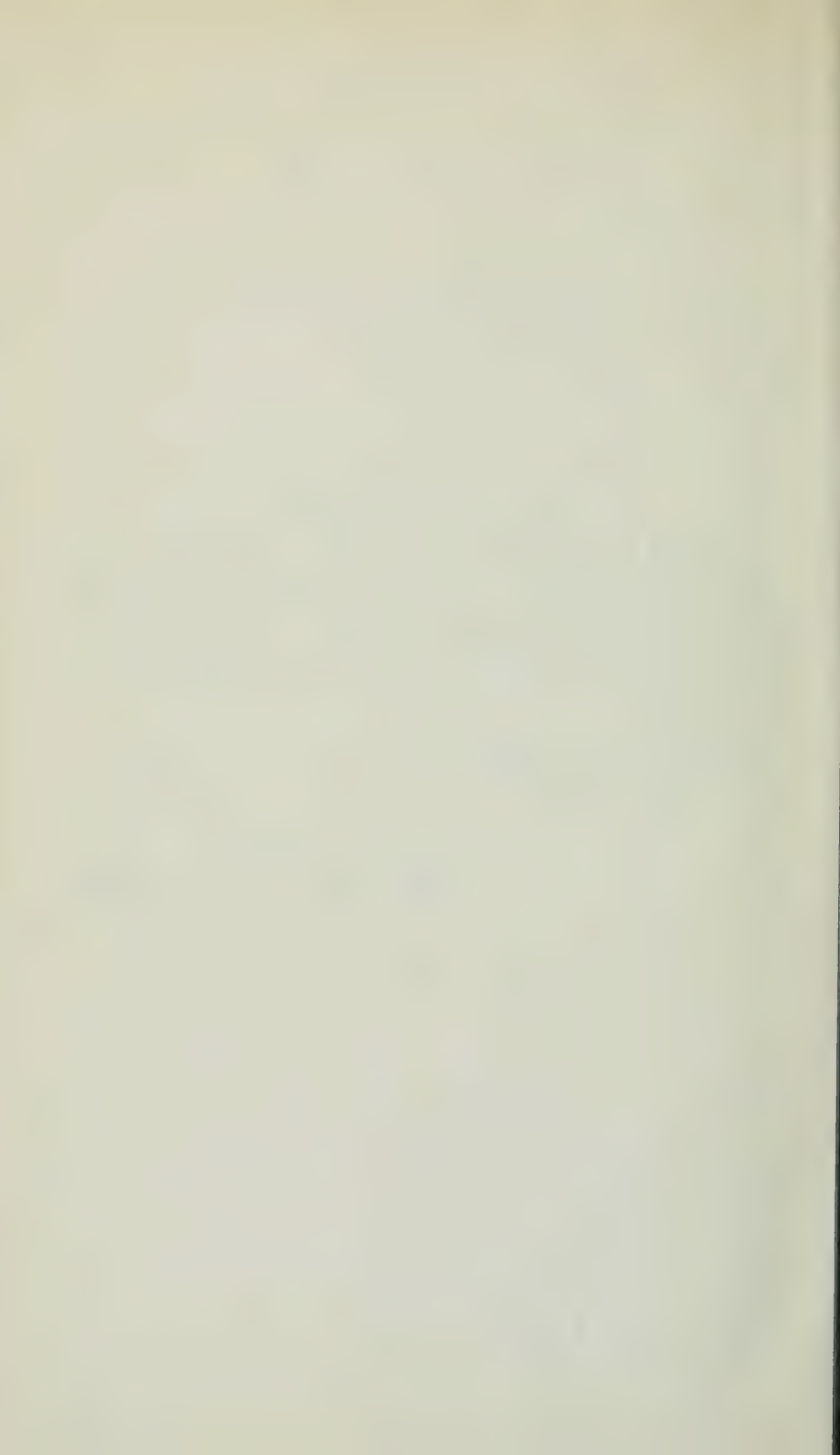
CERTIFICATE OF COUNSEL.

I, Allen G. Wright, one of the attorneys for the respondent in the above entitled proceedings, do hereby certify that the foregoing petition for a rehearing is not interposed for delay and that in my judgment it is well founded.

Dated, San Francisco,  
May 6, 1946.

ALLEN G. WRIGHT,  
*Of Counsel for Respondent.*





No. 11092

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

MAUDE ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

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Upon Appeal from the District Court for the Territory of  
Alaska, Division No. 1

FILED

DEC 17 1945

PAUL P. O'BRIEN  
CLERK



No. 11092

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

MAUDE ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

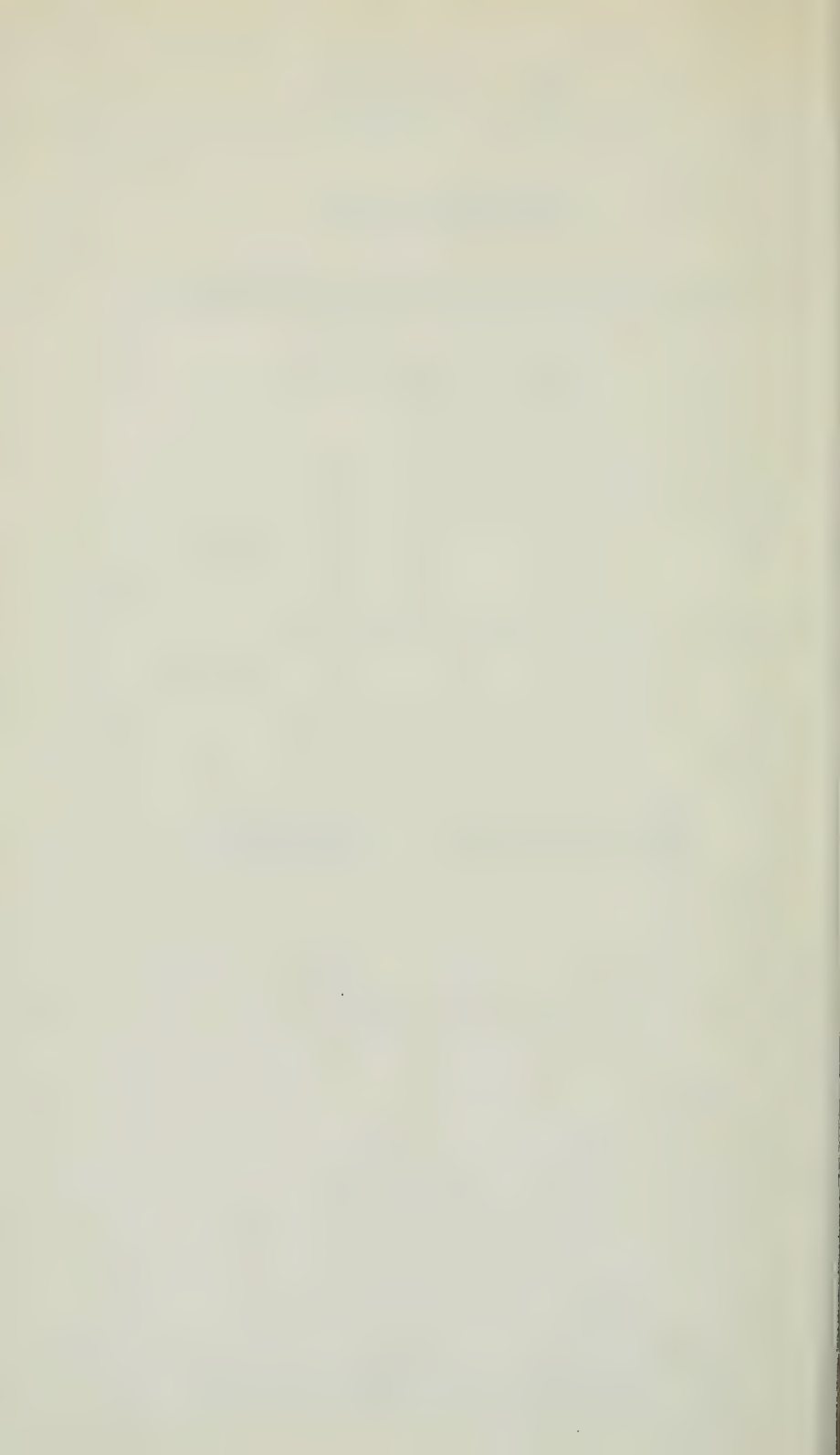
Appellee.

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Transcript of Record

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Upon Appeal from the District Court for the Territory of  
Alaska, Division No. 1





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD:

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R. E. ROBERTSON

M. E. MONAGLE

H. D. STABLER

Juneau, Alaska

Attorneys for Defendant-Appellant



United States of America

Territory of Alaska

Division Number One at Ketchikan—ss.

No. 1416-KB

### INDICTMENT

In the District Court of the Territory of Alaska  
in Division Number One, Ketchikan, at the  
Special October Term Thereof, A. D. 1944.

Knowingly Causing and Aiding Transportation  
of a Woman in Interstate Commerce for Purpose of  
Prostitution.

Violation of Section 398, U.S.C.A. Title 18; 36  
Stat. 825.

The Grand Jurors of the United States and the  
Territory of Alaska, impaneled, sworn, and charged  
at the term aforesaid, of the Court aforesaid, on  
their oath present that Maude Anderson on or  
about the 25th of November, 1941, at Sitka, in  
Division Number One, Territory of Alaska, and  
within the jurisdiction of said Court, did, wilfully,  
unlawfully, feloniously and knowingly transport  
and cause to be transported and aid and assist in  
obtaining transportation for and in transporting,  
in interstate commerce, a woman for the purpose  
of prostitution and for immoral purposes, to-wit:  
Gloria Virginia Knapp Bowman, alias Jean LaRue,  
from Seattle, in the State of Washington, to Sitka,  
in the Territory of Alaska, contrary to the form  
of the statute in such cases made and provided and  
against the peace and dignity of the United States  
and the Territory of Alaska.

Dated at Ketchikan, Alaska, this 24th day of October, 1944.

LYNN J. GEMMILL

United States Attorney, Division Number One,  
Territory of Alaska.

Witnesses Before the Grand Jury:

MARGUERITE LEOTA MILLER

HAROLD ANDERSON

OLIVER MANSFIELD [1\*]

United States District Court

Territory of Alaska

First Division

THE UNITED STATES OF AMERICA

vs.

MAUDE ANDERSON

INDICTMENT

A True bill. —J. A. Talbot, Foreman.

Filed in open Court this 24th day of October,  
A. D. 1944.

Presented by J. A. Talbot, Foreman of the Grand Jury, in the presence of the Grand Jury, in open Court and filed in open Court with the Clerk of the District Court, all on this 24th of October, 1944.

ROBERT E. COUGHLIN

Clerk of District Court, Territory of Alaska, Division #1.

By RUTH SIMONSEN,

Deputy. [2]

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau

No. 1416-KB

UNITED STATES OF AMERICA,

Plaintiff

vs.

MAUDE ANDERSON,

Defendant

MINUTE ORDER MADE ON MARCH 26, 1945

Journal #16 Page 434

At this time the defendant was present in court in person and by her attorney, M. E. Monagle, for arraignment. At this time the defendant was asked her true name to which she responded Maude Anderson. The defendant at this time waived the reading of the Indictment and she was furnished a copy of same. Thereafter the defendant waived time for entry of plea and personally entered a plea of Not Guilty. [3]

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly impanelled and sworn to try the above entitled cause, find that the defendant Maude Anderson is guilty as charged in the indictment.

Dated at Juneau, Alaska. this 7th day of April, 1945.

JOHN LIVIE

Foreman.

Entered Court Journal No. 16 Pages 461-462. [4]

[Endorsed]: Filed April 9th, 1945.

---

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR ACQUITTAL

Comes now the defendant and moves that judgment for her acquittal be made and entered herein and renews her certain motion, which she respectfully submits was in substance a motion for acquittal, which she made in open court at the conclusion of the evidence at the trial of the above cause and in which motion she moved that the court direct the jury to return a verdict herein that she was not guilty.

This motion is based upon the records and files herein and within five days after the jury in the above case was discharged and returned its certain verdict herein finding her guilty, which verdict was

filed herein on April 9, 1945, and which verdict is contrary to both the law and the evidence.

Respectfully submitted,

M. E. MONAGLE

R. E. ROBERTSON

Attorneys for Defendant.

Copy received April 10, 1945.

R. L. JERNBERG

Assistant United States At-  
torney.

[Endorsed]: Filed April 10, 1945. [5]

---

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOT WITH-  
STANDING THE VERDICT

Comes now the defendant and respectfully moves that, notwithstanding the verdict of the jury heretofore filed herein on April 9, 1945, Judgment be entered herein discharging the defendant, upon the ground that said verdict was contrary to both the law and the evidence adduced at said trial.

Respectfully submitted,

M. E. MONAGLE

R. E. ROBERTSON

Attorneys for Defendant.

Copy received April 10, 1945.

R. L. JERNBERG

Assistant United States At-  
torney.

[Endorsed]: Filed April 10, 1945. [6]



[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now defendant and respectfully moves that she be granted a new trial upon the following grounds, to-wit:

1. Irregularities occurring at said trial and the exercise of abusive discretion by the trial Judge, by which this defendant was prevented from having a fair trial, in that: the Court at the trial refused to grant the defendant time for the arrival of Lou Dixon and Irene Holmquist, who were material witnesses to her defense and who would have impeached the witness Marjorie Miller and shown that the latter had told said Dixon and Holmquist that she, Miller, was aggrieved at defendant and intended to get even with her even though it took all the rest of her, Miller's, life, notwithstanding that subpoenas had been issued for said Dixon and Holmquist and defendant in good faith had arranged to bring them to Juneau to testify at the trial in her defense by airplane, which was the only available means of transportation but which airplane could not go from Juneau to the places where said Dixon and Holmquist were and return them to Juneau because a strong storm, known locally as a Taku wind, prevailed in Juneau and also in that area of Southeastern Alaska through which said airplane had to travel in order to pick up said witnesses and bring them to Juneau, which said storm prevailed throughout April 5th and 6th, 1945, on which days defendant's trial in this cause

was being held in Juneau, and which storm prevented airplanes flying on said days, and that defendant had no means of anticipating that such storm would arise and that she would be unable to obtain the attendance of said Dixon and Holmquist; all of which more fully and clearly appears in the stenographic notes of the official court stenographer, taken at said trial, which by reference thereto are hereby made a part hereof.

2. For numerous errors committed by the trial Judge in said trial, to which exception was taken by the defendant at said trial, and all of which appear in the stenographic notes of said official court stenographer, which [7] notes by reference are hereby made a part hereof, and particularly in admitting evidence, over defendant's objections, adduced by the witnesses Miller, Bowman, Kavan-der and Mansfield, and in admitting in evidence, over defendant's objections, plaintiff's Exhibits Nos. 1 and 2, and in refusing to receive, though duly offered, certain evidence, as appears in said stenographic notes, from defendant and from the witness Rands.

3. Error committed by the Court, to which exception was duly taken, in giving to the jury his instructions 5 and 6, and not giving in substance and effect that certain written requested instruction filed with and presented to the Court on April 6, 1945, or defendant's certain two requested instructions Nos. 5 and 6.

4. That the evidence adduced at said trial was

insufficient to justify that certain verdict finding the defendant guilty, which verdict was filed herein on April 9, 1945, and that it is against the law, and that said verdict is contrary to the weight of evidence and is not supported by substantial evidence.

5. The court erred in denying defendant's motion, which was in substance and effect a motion for acquittal, made by her at the conclusion of the evidence, in which she moved that the Court direct the jury to return a verdict finding her not guilty.

6. That defendant was substantially prejudiced and denied a fair trial by reason of the following circumstances: The attorney for the government, in his final argument before the jury, over defendant's objections, stated what purported to be the law governing violations of the statute of which by the indictment herein the defendant was accused of having violated.

Respectfully submitted,

M. E. MONAGLE

R. E. ROBERTSON

Attorneys for Defendant.

Copy received April 10, 1945.

R. L. JERNBERG

Assistant United States Attorney.

[Endorsed]: Filed April 10, 1945. [8]

In the District Court for the Territory of Alaska  
Division Number One, at Juneau

[Title of Cause.]

MINUTE ORDER MADE ON MAY 2, 1945

in Journal #17 Page 4

At this time this matter came before the court for argument on defendant's motion for Judgment notwithstanding Verdict, Defendant's Motion for Acquittal and Motion for a New Trial.

Defendant was present in person and by her attorney, Mr. R. E. Robertson; the Government was represented by R. L. Tollefsen, Asst. United States Attorney. After argument by counsel the Court denied the above motions to which defendant excepted and exception was allowed. [9]

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In the District Court for the Territory of Alaska,  
Division Number One, at Juneau

No. 1416-KB

UNITED STATES OF AMERICA,

Plaintiff

vs.

MAUDE ANDERSON,

Defendant

JUDGMENT AND COMMITMENT

Now, to wit, on this 4th day of May, 1945, this matter came before the Court for the imposition

of sentence upon the above named defendant; Maude Anderson, upon the verdict of the jury, duly impaneled, sworn and charged in the above-entitled cause, by which verdict the said defendant was found guilty of the crime of Knowingly Causing and Aiding Transportation of a Woman in Interstate Commerce for Purpose of Prostitution, in violation of Title 18, U.S.C.A., Section 398, as charged in the Indictment heretofore on the 24th day of October, 1944, returned by the Grand Jury and filed herein; the defendant being present in person and represented by her counsel, M. E. Monagle and R. E. Robertson; R. L. Tollefsen, Assistant United States Attorney, appearing for and on behalf of the United States; the defendant being asked if she had any good and sufficient reason to state why sentence should not now be imposed upon her, to which she offered none, and the Court being fully advised in the premises,

Hereby Orders, Adjudges and Decrees that it is the Judgment of the Court that the defendant, Maude Anderson, is guilty of the crime of Knowingly Causing and Aiding Transportation of a Woman in Interstate Commerce for Purpose of Prostitution, in violation of Title 18, U.S.C.A., Section 398, as charged in said Indictment, and it is the Sentence of the Court that the defendant be imprisoned in the Federal Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of Three (3) Years, and that the defendant pay to the United States of



America a fine of Two Thousand Five Hundred Dollars (\$2,500.00), that it have execution therefor, that the defendant be committed to said Penitentiary until said fine is paid, and that said defendant stand committed until the sentence herein imposed is fully executed and paid, and [10]

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein.

Done in open Court this 4th day of May, 1945.

GEO. F. ALEXANDER

District Judge.

Entered Court Journal No. 17 Page 20.

[Endorsed]: Filed May 8, 1945. [11]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellant: Maude Anderson, Sitka, Alaska.

Name and adress of appellant's Attorneys: R. E. Robertson and M. E. Monagle, P. O. Box 1211, 200 Seward Building, Juneau, Alaska.

Offense: Willfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a

woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, Alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, in violation of Section 398, U.S.C.A. Title 18; 36 Stat. 825.

Date of Judgment: May 4, 1945.

Brief description of judgment or sentence: Defendant was sentenced to be imprisoned in the Federal penitentiary at McNeil Island, Washington, or such other institution as the Attorney General of the United States may direct, for a period of three years, and to pay a fine of \$2,500.00, and that defendant stands committed until such sentence is fully executed and paid.

Name of prison where now confined if not on bail: United States Federal Jail at Juneau, Alaska.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated: Juneau, Alaska, this 8th day of May, 1945.

MAUDE ANDERSON

Maude Anderson.

#### GROUND OF APPEAL:

First: Irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial; [12]

Second: Insufficiency of the evidence to justify the verdict;

Third: Errors in law occurring at the trial and excepted to by the defendant; and

Fourth: Abusive discretion of the trial Court in refusing to grant the defendant time for the arrival of Lu Dickson and Irene Holmquist who were material witnesses for defendant and who would have impeached the government's main witness Marjorie Miller;

Fifth: Abusive discretion in denying the defendant's motion for acquittal, as shown by the defendant's motion for acquittal filed herein and by the Bill of Exceptions to be filed herein;

Sixth: Abusive discretion in denying the defendant's motion for judgment notwithstanding the verdict, as shown by the defendant's motion for a judgment notwithstanding the verdict filed herein, and by the Bill of Exceptions to be filed herein; and

Seventh: Abusive discretion in denying the defendant's motion for a new trial, as shown by the defendant's motion for new trial filed herein; and by the bill of exceptions to be filed herein.

Copy received May 8th, 1945.

R. L. TOLLEFSEN,

Assitant U. S. Attorney,  
Attorney for Plaintiff.

[Endorsed]: Filed May 8, 1945. [13]

[Title of District Court and Cause.]

CLERK'S STATEMENT OF DOCKET  
ENTRIES

1. Indictment for: Willfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, in violation of Section 398, U.S.C.A. Title 18; 36 Stat. 825. Filed October 24, 1944.

2. Arraignment: March 26, 1945.

3. Plea to Indictment: Not Guilty, March 26, 1945.

4. Trial by Jury: April 5th, 6th and 7th, 1945.

5. Verdict or finding of guilt: Found guilty as charged in indictment April 7th, 1945.

6. Judgment: That defendant serve three years in such Federal Penitentiary as the Attorney General of the United States may direct, and that

defendant pay a fine of \$2,500.00, entered May 4, 1945.

7. Notice of Appeal filed May 8, 1945.

Dated: May 8, 1945.

Attest:

J. H. WALMER

Clerk of the District Court

By: J. W. LEIVERS,  
Deputy.

[Endorsed]: Filed May 8, 1945. [14]

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[Title of District Court and Cause.]

CLERK'S AMENDED STATEMENT OF  
DOCKET ENTRIES

1. Indictment for: Willfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, in violation of Section 398, U.S.C.A., Title 18; 36 Stat. 825. Filed October 24, 1944.

2. Arraignment: March 26, 1945.



3. Plea to Indictment: Not Guilty, March 26, 1945.

4. Trial by Jury: April 5th, 6th and 7th, 1945.

5. Verdict, or finding of guilt: Found guilty as charged in indictment April 7th, 1945.

6. April 10, 1945: Motion for Judgment notwithstanding the verdict filed.

7. April 10, 1945: Defendant's motion for Acquittal filed.

8. April 10, 1945: Defendant's motion for a new trial filed.

9. May 2, 1945: M/o. Argument on above motions heard and all motions overruled.

10. Judgment: That defendant serve three years in such Federal Penitentiary as the Attorney General of the United States may direct, and that defendant pay a fine of \$2,500.00, entered May 4, 1945.

11. Notice of Appeal filed May 8, 1945.

Dated: Oct. 12, 1945 nunc pro tunc May 8, 1945.

Attest:

J. H. WALMER,

Clerk of the District Court

By: J. W. LEIVERS,

Deputy.

[Endorsed]: Filed October 12, 1945.

[Title of District Court and Cause.]

## ORDER ADMITTING DEFENDANT TO BAIL

This matter having come regularly on for hearing in Open Court at Juneau, Alaska, on May 12, 1945, with Judge Honorable Geo. F. Alexander presiding, on the petition of defendant to be admitted to bail pending her appeal to the Ninth Circuit Court of Appeals from a judgment of conviction made and entered herein on May 4, 1945. Plaintiff appeared by Robert L. Tollefsen, Assistant United States District Attorney, and defendant appeared by M. E. Monagle, of her attorneys; and, the court being fully advised in the premises,

It Is Hereby Ordered that Maude Anderson, the defendant in the above entitled case, be admitted to bail pending her appeal from the judgment of conviction made and entered herein on May 4, 1945, in the amount of \$25,000.00.

It Is Further Hereby Ordered that the surety on the bail bond or undertaking may justify and qualify before United States Commissioner and Ex-Officio Justice of the Peace, William W. Knight, of Sitka, Alaska, but that the form and sufficiency of the bond shall be finally approved by this court.

The defendant has noted her exception to the amount of the bond on the grounds that the penalty of said bond is unduly excessive and defendant is hereby granted an exception.

Done in Open Court at Juneau, Alaska, the day and year herein first above written.

GEO. F. ALEXANDER

District Judge.

Copy received this 6th day of June, 1945.

R. L. TOLLEFSEN,

Ass't U. S. District Attorney.

Entered Court Journal No. 17, Pages 55-56.

[Endorsed]: Filed June 6, 1945.

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In the District Court for the Territory of Alaska  
Division Number One, at Juneau

[Title of Cause.]

MINUTE ORDER MADE ON MAY 12, 1945

in Journal #17 Page 27

At this time this case came before the court upon motion of R. E. Robertson in behalf of defendant, Maude Anderson, Mr. R. L. Tollefsen, Assistant United States Attorney, was also present in behalf of plaintiff. Thereupon Mr. Robertson gave Notice of Appeal in this case and requested the Court to set the bail bond in behalf of defendant. Upon due consideration the Court set the bail bond at \$25,000 and directed that the United States Commissioner at Sitka, Alaska, take the bond subject to the approval of this Court and thereafter allowed

90 days in which to get out the transcript of the testimony in this case.

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[Title of District Court and Cause.]

### ORDER

This matter having come regularly on for hearing in Open Court on May 12, 1945, with Judge Honorable Geo. F. Alexander presiding, and the plaintiff appearing by Assistant United States District Attorney Robert L. Tollefson, and defendant appearing by M. E. Monagle of her attorneys, and it appearing that defendant filed her notice of appeal herein on May 8, 1945, and less than five days after the date of the Court's judgment of conviction was made and entered herein on May 4, 1945, upon the defendant's petition for the Court's directions as might be appropriate with respect to the preparation of the record on appeal; and, the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the defendant have, and she is hereby given ninety days in which to make and file a transcript of the record, and ninety days within which to make and file her bill of exceptions and have said bill of exceptions settled, and ninety days within which to make and file her assignment of errors herein.

Done in Open Court at Juneau, Alaska, the day and year herein first above written.

GEO. F. ALEXANDER

District Judge.

Copy received this 6th day of June, 1945.

R. L. TOLLEFSEN,

Assistant United States District Attorney.

Entered Court Journal No. 17 page 56. [17]

[Endorsed]: Filed June 6, 1945.

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[Title of District Court and Cause.]

BAIL, COST AND SUPERSEDEAS BOND  
ON APPEAL

Know All Men By These Presents: That we, Maude Anderson, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the state of Maryland with its principal place of business in Baltimore, Maryland, are jointly and severally held and firmly bound unto the United States of America in the penal sum of Twenty Five Thousand (\$25,000.00) Dollars, which payment well and truly to be made we bind ourselves jointly and severally, our heirs, executors and administrators firmly by these presents.

The Condition of the above obligation is such that whereas a judgment having been given on the



4th day of May, 1945, whereby the above named Maude Anderson was condemned to imprisonment in the Federal Penitentiary at McNeil Island, Washington, or such other institution as the Attorney General of the United States may direct, for the period of three years, and to pay a fine of \$2,500.00, and she having appealed from said judgment and been duly admitted to bail in the sum of Twenty Five Thousand (\$25,000.00) Dollars.

Now, therefore, the condition of this obligation is such that the defendant Maude Anderson shall prosecute said appeal to effect, and answer all costs, and pay said \$2,500.00 fine, if she shall fail to make good her plea on appeal, and shall at all times render herself amenable to the orders and processes of this court and of the appellate court, and render herself in execution of said judgment if said judgment of this court is affirmed in said appellate court, or in any court, then this obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands this 11th day of June, 1945. [18]

Signed, Sealed, and delivered in the presence of:

M. E. MONAGLE

MRS. SOPHIA BRITT

M. E. MONAGLE

H. E. GREEN

MAUDE ANDERSON

Maude Anderson, Principal

[Seal] UNITED STATES FIDELITY  
AND GUARANTY COM-  
PANY, a Corporation, Surety.

By R. E. ROBERTSON

Its Attorney-In-Fact

Taken and acknowledged before me this 11th day of June, 1945.

[Seal] M. E. MONAGLE

Notary Public in and for the Territory of Alaska.

My Commission Expires: Mar. 1, 1946.

This undertaking and the surety hereon approved this 11th day of June, 1945.

GEO. F. ALEXANDER

District Judge.

Copy received June 11, 1945.

R. L. TOLLEFSEN,

Assistant U. S. Attorney.

[Endorsed]: Filed June 11, 1945. [19]

[Title of District Court and Cause.]

### BILL OF EXCEPTIONS

Be It Remembered that on the 4th day of April, 1945, at the hour of 2:00 o'clock p. m., at Juneau, Alaska, the above entitled cause came on for trial before a jury, the Honorable Geo. F. Alexander, District Judge, presiding; the Government appearing by R. L. Jernberg and R. L. Tollefsen, Assistant United States District Attorneys; the defendant appearing in person and by R. E. Robertson and M. E. Monagle, her attorneys; and both sides having announced they were ready for trial, a jury was duly empanelled and sworn to try the cause; whereupon the jury was duly admonished and Court recessed until 10:00 o'clock a. m., the following day, April 5, 1945, reconvening as per recess, with all parties present as heretofore and the jury in the box; and that R. L. Tollefsen made the opening statement to the jury in behalf of the Government; that R. E. Robertson requested that the rule be invoked that all government witnesses be excluded from the courtroom excepting the one testifying, and the Court ruled that all witnesses would remain out of the courtroom until called; and that M. E. Monagle made the opening statement to the jury in behalf of the defendant;

And Thereupon, the following proceedings were had and testimony taken, to-wit: [20]

MARGUERITE MILLER

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tollefsen:

Q. Would you state your name, please?

A. Marguerite Miller.

Q. Are you acquainted with the defendant Maude Anderson?

A. Yes, I am.

Q. And when did you become acquainted with her?

A. It was in the spring of—I believe in 1939 or 1940.

Q. And at what place did you become acquainted with her?

A. The Lakeview Cottage in Sitka.

Q. In Sitka?

A. Yes.

Q. Did you have any business dealings with her, or work for her in Sitka?

A. I don't believe I understood just what you meant.

Q. Did you have any business dealings with her, or work for her in Sitka?

A. I was working for Maude.

Q. In what capacity?

A. As a prostitute in Maude's home.

Q. Lakeview Cottage?

A. That is right.

Q. How long did you work there?

A. From March. I left in September and stayed out until the next spring.

Q. What year would that be that you returned there?

A. That would be in 1941. I returned in March and stayed until November.

Q. During that time, in 1941, was the Lakeview Cottage operated as a house of prostitution?

A. Yes, all the time.

Q. Who was operating it?

A. Maude was the owner and landlady.

Q. Are you familiar with the financial arrangement between Maude and the girls in the house?

A. Yes.

Q. Tell the jury what the arrangements were.

A. We gave Maude one dollar out of three, two dollars out of five, four out of ten. We paid her two dollars a day for board and room.

Q. You stated that you were working in this Lakeview Cottage from March to November, 1941?

A. I worked, yes, as a prostitute until September. In September I started to run Maude's place on halves.

Q. You left Sitka in November, 1941?

A. Yes.

Q. Have you any better idea of what date in November?

A. I left Maude's place right after the first Thanksgiving in November, I remember that.

Q. And where did you go?

A. I went to Seattle.

Q. By what transportation did you go?

A. I went down by the boat. On the North Coast.

Q. And when did you decide to make this trip to Seattle?

A. I gave up working for Maude. She had another girl come, and she was going to build me another place of my own, so when this girl came, I took a trip out. We decided I should make a trip to Seattle. That was about—



MISS MILLER

Q. How long before that did you decide to make this trip?

A. How long before I went? Over a period of two weeks altogether.

Q. Prior to the time of your departure on this trip did you have any conversation with Maude Anderson about the procurement of prostitutes?

A. Yes, that was understood.

Q. When and where did these conversations take place? A. In Maude's private bedroom.

Q. Prior to your departure? A. Yes.

Q. Who was present during these conversations?

A. Mostly it was just between Maude and myself.

Q. Did you have any conversation in which a third party was present?

A. Only once was there anyone present.

Q. Who was that party?

A. Maude and I were discussing the trip, and I remember Jackie walking through there.

Q. Jackie who?

A. Jackie Lugo. At that time she was Jackie Lugo.

Q. Tell the jury just what was said in these conversations you had in Maude's place before your departure.

A. She wanted me to get some girls. She was dissatisfied with the girl she had. The girl had been drinking and she thought she wanted some more girls. There was a soldiers' pay day coming,

(Testimony of Miss Miller.)

and I was to go down and make arrangements whereby I could get some girls. She said she would kick what she had out as soon as I got the other girls.

Q. Was anything said about money?

A. Yes. She said for me to get them and if they didn't have the [21] fare to advance it and she would collect and have the money by the time I got back.

Q. Was there any arrangement made for you to notify Maude if you obtained any girls?

A. We had a code message I was to use.

Q. Tell the jury what that consisted of?

A. Coats and dresses instead of girls, and instead of "I am sending" use the words "Please send me." "Please send me a dress by boat," that meant a girl was coming by boat. If I said, "Please send me a dress by plane," that meant a girl was coming by plane; so she would know when to expect the girl.

Q. You say it was Jackie Lugo who was present during the conversation. Do you recall what you were talking about when she was there?

A. Yes. She only came through for a little bit. We were talking about this message. Maude was talking about it. I didn't want Jackie to hear it. I felt very bad about it at the time because we were discussing the message at the time.

Q. The code you were to use? A. Yes.

Q. Do you know Gloria Bowman, also known as Jean La Rue? A. Yes, I know her.

(Testimony of Miss Miller.)

Q. Explain how and when you first met her, and what took place.

A. How I met her?

Q. Yes.

A. I met her. I went to a beer parlor to see if they knew of anyone who knew of a girl. A man at the bar at the beer parlor sent a man to the hotel I was staying at and he said he had a girl and brought the girl to my room.

Q. Who was the girl? [22]

A. This Gloria Bowman.

Q. What took place?

A. I asked her if she wanted to come up here.

Mr. Monagle: We object to any conversation that took place there as not being in the presence of the defendant.

Mr. Jernberg: She hasn't been asked that.

The Court: You can't ask what the conversation was but you can ask what was done or what arrangements were made.

A. I made arrangements with her to come up here and to leave on the same boat I went down on, to be in time for the soldiers' pay day. I advanced her \$70.00 of my own money.

Q. For what?

A. Transportation, cab fare, and some money to have while on the boat, a little bit to spend.

Q. Was any arrangement made for repayment?

A. I told her to give the money to Maude.

Mr. Monagle: We object to any conversation regarding arrangements down there.

The Court: What arrangements? With who?

(Testimony of Miss Miller.)

Mr. Tollefsen: Gloria Bowman.

The Court: By this witness?

Mr. Tollefsen: Yes.

The Court: I don't think it is material any way.

Mr. Tollefsen: If the Court please, we have already established that the witness was acting for the defendant. Consequently the arrangements made between the defendant and this witness have to be carried through this witness to the third party, and are binding on the defendant if the jury is convinced beyond a reasonable doubt.

Mr. Monagle: We don't agree that is the law. Any conversation that took place between this witness—or any [23] conversation, unless in the defendant's presence——

The Court: It would be if she was acting as agent.

Mr. Monagle: There is no foundation.

The Court: She testified that she arranged, before she went down, with the defendant that if the girls were not able to do so that she was to pay the fare and would be reimbursed when she got back.

Mr. Monagle: She also testified that she made arrangements to get a place of her own from Maude Anderson. That is her testimony.

The Court: I don't recall that.

Mr. Monagle: I submit to the Court Reporter.

Mr. Tollefsen: That would be taking it out of the jury's hands at this point. It has certainly been established, if they believe her testimony, that

(Testimony of Miss Miller.)

there is an agency there and that she was procuring girls for the defendant, and we are entitled to go into that. She was acting as agent for the defendant. If the jury doesn't believe an agency existed, they can find some other possible explanation. That does not make it inadmissible.

The Court: I didn't hear that.

Mr. Monagle: I submit that she testified she was running a place owned by Maude Anderson, and then——

The Court: She was running it?

Mr. Monagle: And Maude got another woman to run it and arranged to——

The Court: Let the Court Reporter read that testimony.

Court Reporter: "I gave up working for Maude. She had another girl come, and she was going to build me another place of my own, so when this girl came, I took a trip [24] out. We decided I should make a trip to Seattle."

Mr. Tollefsen: If there is any doubt on it, I would like to be heard further, but the jury should be excused.

The Court: The matter ought to be cleared up right now. Who were you procuring Gloria Bowman for?

A. For Maude Anderson.

The Court: And in the arrangements you made with Gloria Bowman who were you acting for?

A. Maude Anderson.

The Court: At all times?



(Testimony of Miss Miller.)

A. At all times.

The Court: Did you have any interest in Gloria Bowman yourself?

A. Nō, I didn't.

The Court: The money you advanced her you advanced for Maude Anderson?

A. Yes.

The Court: Under a previous arrangement with her?

A. Yes.

The Court: Go ahead.

Q. What arrangement did you make, if any, with Gloria Bowman for repayment of the \$70.00?

A. She was to pay it back to Maude.

Mr. Monagle: We would like an exception. If the conversation took place in Seattle——

The Court: I understand that. If she was acting as agent for the defendant here, it would be admissible, certainly.

Mr. Monagle: We would like an exception, for the reason that there is no agency and no foundation has been laid, [25] and anything said in Seattle is not binding on the defendant, and for the further reason that the witness on the stand admitted being an accomplice in the deal, and that any testimony down there is incompetent, irrelevant and immaterial.

The Court: There is no objection that I know of as a basis for your exception.

Mr. Monagle: The Court ruled she could answer

(Testimony of Miss Miller.)

the question. We object to her answering the question on those grounds I stated.

The Court: Objection be denied.

Mr. Monagle: Exception.

The Court: It will be allowed. Go ahead.

Q. Subsequent to your advancing this money to Gloria Bowman, do you know what she did?

A. Yes.

Q. What? A. She worked as a prostitute.

Mr. Monagle: We object to that as hearsay. It would be entirely hearsay as to what Gloria Bowman did.

Mr. Tollefsen: If the Court please, I asked if she knew and she said she did.

The Court: It wouldn't be hearsay if she knew.

Q. What did she do after you gave her this money?

A. She went and bought a ticket and came back and showed me the ticket.

Q. What boat did she leave on?

A. The North Coast. The same one I went down on.

Mr. Monagle: We ask for an exception to all these questions as being incompetent, irrelevant and immaterial, [26] and not binding on the defendant—the defendant wasn't there.

Mr. Tollefsen: If the Court please, there is no conversation involved in this line of questioning—

Mr. Monagle: If an exception isn't good on any other ground, it isn't primary evidence. Gloria Bowman is the best witness as to what she did.

(Testimony of Miss Miller.)

The Court: She can testify to what she knows in carrying out the arrangement she claims to have made.

Mr. Monagle: We object on the ground that the witness performed acts for her, and that is the best evidence of fact.

The Court: That is not necessarily the only evidence. The witness may answer if she knows. She says she knows, and I assume she is testifying from personal knowledge. If she is, it is admissible.

Q. Did you state what boat she left on?

A. She left on the North Coast.

Q. Did you do anything else about procuring girls for Maude?

A. Yes. I got her two more girls.

Mr. Monagle: That is immaterial. She is not accused of bringing anyone but Gloria Bowman.

Mr. Tollefsen: If the Court has any doubt on that point, I would like to be heard in the absence of the jury?

The Court: Do you want to press that point?

Mr. Monagle: Yes, your Honor.

The Court: The jury will be excused until called.

(Whereupon the Court admonished the jury, and the jury retired to the Jury Room.) [27]

The Court: I will save time by stating that I think this testimony is admissible if she did secure two other girls in pursuant of the same arrangement, on the same trip. If you have authorities to the contrary, I would like to see them.

(Testimony of Miss Miller.)

Mr. Monagle: My position on that line of questioning is that anything else she did is purely prejudicial—as to any other girls. The defendant is only accused in the indictment of bringing one girl up. If she brought some other girls, whether she is indicted for it or not, our client isn't. It is prejudicial to the jury.

Mr. Tollefsen: If the Court please, it naturally goes to the intent, motive and plan by showing other actions of the same type and character. We will introduce in evidence a communication with reference to the other two girls, as well as Gloria Bowman. It is necessary the evidence be introduced, to show the other two girls were being procured, in order that the documentary evidence will make sense regarding the same transaction.

The Court: Read the question asked just before this discussion started.

Court Reporter: "Did you do anything else about procuring girls for Maude?"

Mr. Tollefsen: Any acts we show whereby she procured any girls in Seattle for Maude Anderson indicates and substantiates the arrangement with Maude, that she was acting as agent in procuring these girls; not to convict her for bringing up any other girls she might have brought up; but to substantiate and indicate the plan [28] under which——

The Court: A general course of conduct.

Mr. Monagle: A general course of conduct as to other girls doesn't substantiate this. If the

(Testimony of Miss Miller.)

District Attorney is attempting to prove conspiracy, that is different.

The Court: It doesn't charge any.

Mr. Monagle: We submit there isn't any, if it please the Court.

The Court: I think the fact should be established clearly and conclusively that the procuring of these other two girls, if they were procured of course, was made pursuant to general instructions—not general instructions, but pursuant to the instructions from the defendant and was part of her mission down below, in other words part of a general plan.

Mr. Tollefsen: (To Court Reporter) Would you read that question back again?

The Court: Wait until the jury comes before asking any additional questions. Call the jury.

(Whereupon the jury returned to the Jury Box.)

Q. I will withdraw the last question. I will ask you, if while you were in Seattle, you did anything else toward procuring girls for Maude Anderson, in accordance with your arrangement with her? A. I got two girls.

Mr. Monagle: We object on the ground that it is not binding on the defendant and is incompetent, irrelevant and immaterial. [29]

The Court: It would be better to ask if the arrangement with the defendant was to get other girls, or how many girls, or what the arrangement was.



(Testimony of Miss Miller.)

Q. Will you state again what the arrangement was about getting girls and how many?

Mr. Monagle: When and where, and what arrangements were made?

Mr. Tollefsen: I am asking the question.

Mr. Monagle: I would like to know where and when—I might object—Sitka or Alaska—where was the arrangement made?

Q. You previously made an arrangement in Sitka? A. Yes.

Q. Prior to your departure for Seattle?

A. Yes.

Q. At that time and place what arrangement did you have with Maude?

A. That I should bring three girls and, if I could get another that was real good, to bring her.

Q. How many?

A. Three for sure, and if possible to get another because she would like to replace one she had, and put her in the place, but three any way.

Q. Pursuant to that arrangement did you do anything else in Seattle about getting girls, other than what you testified to regarding Gloria Bowman?

A. Yes. I got two more girls.

Mr. Monagle: Answer “yes” or “no”.

The Court: Address your remarks to the Court.

Mr. Monagle: I don't have a chance to interpose my objections. [30]

The Court: She said that she did get two other girls.

Mr. Monagle: I move to strike the answer. She

(Testimony of Miss Miller.)

was asked if she did, not what she did. I move to strike the answer.

Mr. Robertson: If she would answer "yes" or "no," we would have a chance to object.

The Court: I don't think the witness understood the question. That answer was responsive to it. Objection denied.

Mr. Monagle: We will take an exception.

Q. What arrangement did you make with these other two girls?

Mr. Monagle: We object to that on the same grounds stated—incompetent, irrelevant and immaterial, and not binding on the defendant.

The Court: Overruled.

Mr. Monagle: We will take an exception. It will save time if we except to all questions of conversation and arrangements with any other person than the defendant here and Gloria Bowman, who she is charged with bringing up. If the Court will allow an exception to all questions and answers, it will save interrupting.

The Court: That is pretty broad. I am admitting this testimony as to any others than Gloria Bowman on the theory that it establishes a general course of conduct.

Mr. Monagle: Our objection is based on the ground that the defendant is not charged with a general course of conduct but with bringing Gloria Bowman up.

The Court: There is no crime of general course of conduct that I know of. Go ahead.

(Testimony of Miss Miller.)

Mr. Tollefsen (To Court Reporter): Will you read the question back? [31]

Mr. Monagle: Will the Court give us an exception to that question?

The Court: I can't rule on an exception of that kind.

Court Reporter: "What arrangement did you make with these other two girls?"

A. I made arrangements to have them come here by plane—to Sitka by plane—and advanced them the fare, the same as I did the other girl.

Q. Did you advise Maude Anderson you had procured these three girls? A. Yes.

Q. By what form of communication?

A. Telegraph and code message.

Q. Do you recall what was said in that message?

Mr. Monagle: We object, if the Court please. If a telegram was sent, and she said one was, the telegram is the best evidence.

The Court: It is if you have it.

Mr. Tollefsen: If the Court please, this telegram was sent to the defendant. Consequently it was not in the possession of this witness. We have the telegram but it was obtained by another witness. I want this witness to testify to what she sent so it can be identified when it is introduced in evidence.

The Court: If it is her telegram, she can identify it.

Mr. Tollefsen: Then I will ask the Court to let

(Testimony of Miss Miller.)

me withdraw this witness and call the witness who has it, and then——

The Court: Can't you show her this telegram and have her identify it as the message she sent—not on the same [32] paper, but the identical message?

Mr. Monagle: If it is the same message she sent, anything she sent is not binding on the defendant.

The Court: As to the telegram——

Mr. Monagle: Anyone could send you a telegram but it would not be binding on you, would it?

The Court: We are wasting time, under the circumstances, as your client ought to know whether the telegram was sent to her.

Mr. Monagle: I haven't seen it, but I don't like it in the record.

Mr. Robertson: They should produce it and let us look at it.

The Court: You are entitled to before it is introduced.

Mr. Tollefsen: I will ask that the telegram be marked for identification, and I will show it to this witness and a subsequent witness, and show it is the same telegram that was obtained by the subsequent witness. I would like to have it marked so the record will show it is the same telegram being testified to by both witnesses.

The Court: It may be marked for identification.

(Said telegram was admitted and marked Government's Exhibit Number "A" for Identification.)

(Testimony of Miss Miller.)

Q. I will show you Plaintiff's Exhibit "A" for Identification and ask if that is the telegram which you sent?

The Court: To the defendant Maude Anderson.

Q. To the defendant Maude Anderson, regarding these three girls?

Mr. Monagle: May it please the Court, let the witness be instructed to answer "yes" or "no" to that question. [33]

The Court: That is what she is asked.

Q. Is that the telegram you sent?

A. Yes; that is the same message any way.

Q. Did you have any other communication with the defendant Maude Anderson regarding the procurement of these girls, besides that particular telegram?

A. Before I went down, you mean?

The Court: Any other telegrams, you mean?

Q. Telegrams, letters or communications between you and Maude Anderson, while you were south?

A. Yes.

Q. What did they consist of?

Mr. Monagle: We object to what they consisted of as not the best evidence. If there were letters from the defendant——

Q. I will withdraw that. Did you receive a letter from the defendant regarding those girls?

A. Yes.

Q. Where is that letter?

A. I haven't got it. I destroyed it.

Q. Will you state what the letter contained? It has been established the letter was destroyed.



(Testimony of Miss Miller.)

Mr. Monagle: May it please the Court, I think the question should be more definite as to when the letter was dated, when it was received, and where it was sent from. She testified the letter was destroyed. Under the rules of private rights, we have the right to know who it came from, and when, and it must be authenticated.

The Court: She said it was from the defendant Maude Anderson. About when did you receive this letter? [34]

A. I received it when I was in Los Angeles, shortly after the war was declared. That would be along——

The Court: Before or after you sent the girls up here?

A. After—that I received the letter.

The Court: Did it have to do with the sending of these girls up here?

A. Yes.

The Court: How?

A. Yes, it did.

Q. What did the letter say?

Mr. Monagle: We object, may it please the Court, on the grounds that it is not binding on the defendant, is not substantiated or authenticated, and is something that happened after the date of the defendant's being accused of committing the crime, and wouldn't be binding on her.

The Court: Certainly her own writing should be binding on her. The witness testified she had a letter from her shortly after war was declared, and in relation to this girl transaction.

(Testimony of Miss Miller.)

Mr. Monagle: We have a right to know whether it was written by Maude or typewritten.

The Court: Maybe your client has a copy of it.

Mr. Robertson: We take exception to the Court's insinuation from the Court's own mouth.

The Court: The Court doesn't mean to convey such an impression. The line of objection is such that I am trying to find out what counsel does want any way.

Mr. Monagle: The only thing we want is to limit the proof to what defendant is charged with. He can't go a year after or two years behind. She isn't giving any [35] date when it was received in Los Angeles.

The Court: I beg your pardon. She said it was about the time War was declared. She said she was in Los Angeles, and this letter she received, as I understand it, was received there about the time War was declared. Is that what you said?

A. Yes, right afterwards.

The Court: It is a matter of general knowledge when War was declared.

Mr. Monagle: It is at least forty days after the date she is charged with the crime—well, it is two weeks after she testified she sent the girl up, on the same boat she went down on, and she left the last part of November.

The Court: I asked her if it had to do with this same transaction, this girl transaction. If it is, it is admissible.

Mr. Monagle: The only thing is how can she

(Testimony of Miss Miller.)

“aid and assist” after the girl is in Sitka, by her own testimony.

Mr. Jernberg: If the Court please, we believe we are pretty well supplied with authorities. If the jury will be excused, I would like to convince Mr. Monagle.

The Court: The Court is convinced already.

Q. Will you state what that letter contained?

Mr. Monagle: We object to all testimony about this letter on the grounds that it is not authentic and there is no proof as to the date or time and it is incompetent, irrelevant and immaterial and self-serving on the part of the witness.

The Court: Answer the question. Read the question.

Court Reporter: “Will you state what that letter contained?” [36]

A. In that letter Maude said the two girls hadn't shown up and she didn't know where they were. She was talking about the girls, the houses, and since the War was on they were having blackouts and that business was bad and she might have to close. She said she decided not to build on to her mother's home for me.

Q. Did she state anything in that letter about Gloria Virginia Bowman?

A. Yes. She said one girl had arrived by boat, but those on the plane didn't.

Q. Then did you return to Sitka from the south, from that trip?      A. Yes, later on.

Q. When did you return?

A. The last part of January.

(Testimony of Miss Miller.)

Q. What year would that be?

A. That would be 1942.

Q. Upon your arrival in Sitka, where did you go?

A. I went to the cottage I was living in, and then I went over to Maude's place.

Q. Did you have any conversation with Maude Anderson at that time regarding these girls?

A. Yes. We discussed it, and I asked her——

Q. When was this? When did the conversation take place?

A. In the morning when the boat got in. Rather early in the morning. Nine or ten o'clock perhaps.

Q. The latter part of January, 1942?

A. Yes.

Q. Where did it take place?

A. In Maude's cottage—her home.

Q. Was anybody else present? [37]

A. No.

Q. What was said at that conversation?

A. It was said that the two girls didn't come at all. This other girl came and then left the place. I asked her if she got my money, and she said "no."

Mr. Monagle: You said you asked her if she got some money?

A. I asked her if she collected my money from the girl.

The Court: What girl?

A. This Virginia Bowman.

Q. What did she say?

A. She said, "No," the girl wouldn't pay it to

(Testimony of Miss Miller.)

her, that she denied it and wouldn't pay her any money. She said she tried to collect it.

Q. Subsequent to that time did you make any settlement with Maude Anderson with reference to the money you advanced?

A. Later on Maude allowed me the difference on that money and some from another girl, for the rent.

Q. What do you mean by that? Explain a little more fully.

A. I had some money coming to me from the girls that were supposed to come by plane and didn't show up. The money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in.

Mr. Robertson: I will ask the Court to instruct the witness to speak louder, and ask that the Reporter read the last answer to tell what she said.

The Court: The witness will speak louder so we can all hear. Read the answer.

Court Reporter: "I had some money coming to me from the girls that were supposed to come by plane and didn't show [38] up. The money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in."

Q. Who owned the cottage you were living in?

A. Maude.

Q. You were renting it from her?

A. Yes. I was renting it since in September that year.



(Testimony of Miss Miller.)

Q. How big a place was that?

A. One large bedroom, and a built-on small kitchenette, and a bath.

Q. Do I understand you to say that Maude allowed you or applied the money these girls owed you against the rent you owed her on that cottage?

A. Yes.

Q. How long did you stay in Sitka when you returned at this particular time?

A. I left there some time in March.

Q. The same year? A. Yes.

Q. And did you return to Sitka after that?

A. No.

Q. In this connection, with this same transaction, you are charged with violation of the White Slave Traffic Act, are you not? A. Yes.

Q. And where were you apprehended on that charge? A. Los Angeles.

Q. Explain the circumstances under which you were apprehended.

Mr. Monagle: We object to that.

The Court: I can't see how that could be competent.

Mr. Tollefsen: I will withdraw the question. You may cross-examine. [39]

(Recess.)

### Cross-Examination

By Mr. Robertson:

Q. Miss Miller, I understood Mr. Tollefsen to ask you shortly before he finished the Direct Ex-

(Testimony of Miss Miller.)

amination whether or not you were charged with the crime of violation of the White Slave or Mann Act. Is that what you were asked, or not?

A. I don't remember.

Q. Is it true you have plead guilty——

A. That is right, I plead guilty.

Q. To an indictment charging you with furnishing transportation for this prostitute Jean La Rue or Bowman from Seattle to Sitka, is that not true?

A. I have plead guilty.

Q. You weren't engaged in prostitution in November, 1941, in Sitka, were you?

A. I was operating Maude's house in November.

Q. But you were not engaged in prostitution; you had gone out of the business of being a professional prostitute?

A. No. I worked some, too.

Q. What day did you leave Sitka in November, 1941?

A. It was right after the first Thanksgiving, on the end of that week. I went out on that boat. I don't remember the exact date.

Q. Prior to your leaving there, you said you had a conversation with Maude Anderson about your going to Seattle and procuring some girls for prostitution in Sitka, is that right?

A. That is right.

Q. I understood you to say at one time there was a girl by the name of Jackie Nuga, or some such name, is that correct? [40]

A. Yes.

Q. What was that girl's name? Jackie Nuga?

A. Lugo.

(Testimony of Miss Miller.)

Q. That was your sister, wasn't it?

A. Oh, no.

Q. That was not your sister?

A. No relation at all.

Q. She was not present at the time that you claim you and Mrs. Anderson made up this code, was she?

A. Do you mean was she there at the time we were making it up?

Q. Yes.

A. She was there at the time we were discussing it.

Q. Right in the room?           A. Yes.

Q. Where is she now?

A. I guess she is out in the hall.

Q. The same Jackie Lugo?           A. Yes.

Q. Who was Jackie working for at that time?

A. At that time?

Q. Yes.

A. She was working for Maude and myself.

Q. For Maude and yourself?

A. Yes, Maude and I. I had the place on halves with Maude.

Q. Isn't it a fact, Miss Miller, at that time Jackie was working for a woman by the name of Ruby Hazelwood?           A. No.

Q. That is not true?

A. Not at that time, no.

Q. You returned to Sitka what time in 1942?

A. It was along the last of January some time. It possibly might have been even the first of February.

(Testimony of Miss Miller.)

Q. When you got back Jean La Rue or Bowman was working there?

A. She was working at a place called the Red House.

Q. She was not working in any house owned by Mrs. Anderson?

A. That is right.

Q. Was she, or not?

A. She was not.

Q. Did you accompany her down to the boat North Coast when she left Seattle to come to Sitka?

A. I did not.

Q. When was it you last saw her in Seattle?

A. At the hotel.

Q. What hotel?

A. The Atwood.

Q. You don't know of your own personal knowledge that she went to Sitka?

A. I called the next morning.

Q. Of your own personal knowledge——

A. I didn't see her go.

Q. All you know is what someone else told you?

A. I called up the steamship company.

Q. You only know what somebody else told you, isn't that correct?

A. Yes.

Q. You spoke about, if I understood your testimony, you spoke about two other girls or women who you said were going by plane?

A. That is right.

Q. Who were they? What were their names?

A. Their names—one was Diana Crawford and the other was Maxine something; I have forgotten her last name now. [42]

Q. Did you accompany them to see them depart from Seattle for Sitka?

A. No.

(Testimony of Miss Miller.)

Q. You don't know whether, of your own personal knowledge, they ever went to Sitka?

A. I don't believe I understand.

Q. You don't personally know whether they ever went to Sitka, except what someone else told you?

A. They never went to Sitka that I know of. They got kicked off the boat.

Q. Now then, after you got back to Sitka late in January or early in February, 1942, how long did you remain in Sitka then?

A. I left there sometime—I think it was in March.

Q. In March, 1942?           A. Yes.

Q. When did you next return to Sitka after that?           A. I never have been there since then.

Q. You have never been there since then. Is it not a fact that you left Sitka at that time because you found, when you got back to Sitka, on account of the War Mrs. Anderson had not built this house which you and she agreed she would build and lease to you?           A. No, that isn't the reason.

Q. Did you work as a prostitute after you got back to Sitka the latter part of January or the early part of February, 1942?           A. I did not.

Q. Where did you work?

A. I didn't work at all.

Q. You didn't work at all. Now then, when was it that Mrs. Anderson gave you the credit, as you claim, upon the rent that you owed her, for the money you claimed you advanced to [43] this Jean La Rue and to these other two girls?



(Testimony of Miss Miller.)

A. In March.

Q. March, 1942?           A. Yes.

Q. Is that true?           A. Yes.

Q. Was any money handed over to you in any form?           A. From Maude?

Q. Yes.           A. No.

Q. Did Maude give you a check of any kind?

A. No.

Q. Or a bank draft of any sort?           A. No.

Q. No dime of any kind?

A. Not to my knowledge, no.

Q. When had this rent—for what period of time was this rent for, which you claim she gave you credit?           A. I think it was three months.

Q. What three?

A. I hadn't paid her any since I had been back so it must have been at least January, February and March.

Q. You didn't get back until the latter part of January or early February. Did you pay anything while you were away?           A. No.

Q. That would only be two months.

A. I was out and my rent was due.

Q. Were you paying rent while you were absent in Seattle?

A. I think the rent was paid to the time I left for Seattle, but I hadn't paid any when I came back. [44]

Q. While you were absent in Seattle—you were gone from Sitka to Seattle from about a day or so after the first Thanksgiving in November, 1941, up

(Testimony of Miss Miller.)

to the latter part of January or early February, 1942—I would judge ten or eleven weeks or so?

A. Yes.

Q. Were you supposed to pay Mrs. Anderson during that time while you were down in Seattle?

A. Naturally I would pay rent. I was still keeping her home.

Q. You were still keeping her home?

A. I had my things in that place.

Q. That is the rent she charged off when you came back, as credit against the money you claimed you advanced to these three girls, is that right?

A. That is right.

Q. Did Mrs. Anderson raise any objection to paying back money you advanced to the other two girls who never arrived?

A. Yes.

Q. But you convinced her she should pay it?

A. I convinced her I had it coming to me.

Q. She told you, as I understood it, that Jean La Rue or Bowman had refused to make any reimbursement?

A. Yes.

Q. Of the money which you claim you gave to Jean to come from Seattle to Sitka, is that right?

A. That is right.

Q. Is this letter you told Judge Alexander about, is that the only letter you ever received from Maude Anderson?

A. No. I received another letter after that.

Q. How long after that?

A. Just before I came back in January. [45]

Q. Just before you came back in January. Now

(Testimony of Miss Miller.)

then, how long did you stay in Sitka, I mean in Seattle after you got there in November, 1941?

A. Just long enough to get the girls for Maude and then I went to Los Angeles.

Q. And that is where you contend you got this letter from Maude Anderson, this letter you got in December, 1941, which you claim was addressed to you in Los Angeles?

A. Yes.

Q. How did you happen to destroy that letter?

A. Because it could be evidence against Maude and evidence against me.

Q. When did you destroy it?

A. I destroyed it before I came back.

Q. You destroyed it before you came back the latter part of January, 1942?

A. That is right.

Q. How did you destroy it?

A. I tore them up and put the evidence in the waste basket.

Q. Was any photostatic copy of that letter, or any other copy of any kind made, to your knowledge?

A. No.

Q. You also destroyed the envelope?

A. I can't recall, but I imagine I did.

Q. But you really don't know?

A. I usually pick up a letter and tear it in two, envelope and all.

Q. There wasn't any money included?

A. No.

Q. No check?

A. No. [46]

Q. No draft of any kind?

A. No.

(Testimony of Miss Miller.)

Q. Had you written from Seattle to Mrs. Anderson and told her what your address in Los Angeles would be?

A. She knew my sister's address that I had always had.

Q. You had this address of your sister's in Seattle all the time? A. Los Angeles.

Q. You had that all the time? A. Yes.

Q. That was well known? A. Yes.

Q. Was that why the F. B. I. had such a hard time finding you down there?

Mr. Jernberg: We object.

Q. I will withdraw the question. When did you leave Los Angeles? A. When do you mean?

Q. When you were returning north that time, to come back to Sitka.

A. The last time I came to Sitka?

Q. The latter part of January or early February, 1942; when did you leave Los Angeles?

A. The last of January, I left there to come up here.

Q. How did you return home to Sitka?

A. I came to Seattle on the train, and then by boat the rest of the way.

Q. What boat did you come back on?

A. North Sea.

Q. Now during this period—I asked you a while ago about this Jackie being your sister—you did have a sister in Sitka? A. Yes.

Q. Is she still in Sitka? [47] A. No.

Q. Where is she?

(Testimony of Miss Miller.)

A. At home, her own home.

Q. Did she work for you as a prostitute?

A. She never was a prostitute. She never worked as a prostitute or was in those places.

Q. You know Irene Holmquist in Sitka or vicinity, don't you?      A. Yes.

Q. She has never been a prostitute either, so far as you know?      A. Not that I know of.

Q. She is Mrs. Anderson's sister, isn't she?

A. Yes.

Q. Isn't it a fact, Miss Miller, after you returned to Sitka the latter part of January or early February, 1942, and before your departure from Sitka in March, 1942, sometime during that period in Sitka, Alaska, you approached Irene Holmquist, knowing she was a sister of Mrs. Anderson's, and told Irene Holmquist that you were going to get a revenge against Mrs. Anderson for having failed to build this house for you?      A. No.

Q. Wait a minute—and you were going to try to get her by accusing her of furnishing or aiding in furnishing transportation of these three women from Seattle to Sitka, or in substance, didn't you tell Irene Holmquist that?      A. I did not.

Q. You did not. Now I will ask you whether or not, during that same period—pardon me—you know Clarence Rands, a contractor and prominent business man, don't you?      A. Yes.

Q. Sometime during that period, in Sitka, Alaska, I will ask you [48] whether or not you didn't ask or tell Mr. Clarence Rands in substance



(Testimony of Miss Miller.)

that you were so going to get revenge against Mrs. Anderson?      A. I did not tell him that.

Q. Not exactly or in substance?

A. When he came over to see when she could have the cottage, I told him I was not sure I would leave right away and that Maude knows why.

Q. I can't hear.

A. When he came to the cottage before I was ready to leave to see when he should start building, I told him the reasons why I was not giving the place up. I said, "Wait and I will call Maude, and let you know right now," and he said, "Wait a minute. Let me get out. I don't want to get mixed up on anything."

Q. The question I asked was whether or not during the period in Sitka, Alaska, you didn't so tell Mr. Clarence Rands in substance that you were going to get even with Mrs. Anderson?

A. No.

Q. By accusing her of furnishing or aiding in furnishing transportation of these three women from Seattle to Sitka?

A. That is the only thing, the only conversation I had with him on that.

Q. I am talking about the period during the latter part of January or first part of February, 1942, to March, 1942. You had no such conversation during that period?

A. Only the one I told you about.

Q. Do you know a girl over in Sitka by the

(Testimony of Miss Miller.)

name of Lou Dixon or Northrup, that formerly was a prostitute in Sitka?

A. I know her in a way. I am not very well acquainted with her. [49]

Q. Now, during this period, sometime during this period between the latter part of January and early February, 1942, and the date in March, 1942, when you left Sitka, did you not, in Sitka, Alaska, or vicinity, talk with Lu Dixon and tell her that you were going to get even with Maude Anderson because she failed to build this house for you, by accusing her of either furnishing or aiding in furnishing transportation of these three women from Seattle to Sitka? A. I did not.

Q. Or tell Lu Dixon that in substance?

A. No.

Q. You did not? When you returned to Sitka the latter part of January or early February, 1942, how long had you been there before you encountered Jean La Rue or Gloria Virginia Bowman or whatever her real name is?

A. I got in touch with her within a day or two; as soon as I could I got in touch with her.

Q. I don't think I asked this, if I did, I don't mean to be repetitious. Where was she working at that time? A. At the Red House.

Q. Not Maude Anderson's? I asked that before, didn't I? I understood you to say that Jackie Lugo was working in this house which you were running together, or for, or however you considered

(Testimony of Miss Miller.)

it, or with Mrs. Anderson in November, 1941, is that correct?      A. Yes, she was there.

Q. Wasn't Jackie Lugo working as a prostitute for a house of Ruby's during October and November, 1941?      A. No.

Q. You are sure? [50]

A. I am quite sure of that.

Q. You said you were actually running this house of Maude Anderson's right up to the time you left Sitka in November, 1941?

A. No. I gave it up about a week ahead.

Q. Where were you living that last week?

A. In my own cottage.

Q. Who did you rent the cottage from?

A. Maude.

Q. You were not engaged in prostitution at that time, were you?      A. No.

Q. Pardon me. I did ask that. Up to that time you were living in your own cottage, rented from Maude, and were not engaged in prostitution, and were running this house and got half the proceeds, didn't you?

A. Yes, on everything but one of those phonograph machines, nickelodians——

Q. You didn't get that?

A. And I got half the liquor.

Q. The only place or house that you had and for which you claimed you were supposed to have paid rent for while you were absent in Los Angeles and Seattle during the period from the 10th or 12th of November, 1941, to the latter part of Jan-

(Testimony of Miss Miller.)

uary or early February, 1942, was this house you had been living in just before you went south, and you were living there as a respectable woman and not as a prostitute, isn't that correct?

A. That was the only house.

Q. Weren't you, when you went to Seattle, inquiring for some furniture for this house Maude Anderson through your arrangement was to build for you?

A. Linens, bedding, a stove, and I think a couple of chairs. She [51] had some furniture in her barn I was going to use.

Q. As a matter of fact, didn't you bring back with you some furniture at least for that house, thinking Mrs. Anderson had built the house for you during your absence?      A. No.

Q. Didn't you bring some of that furniture back and sell it before you left for the south in 1942 to somebody called Harry Van?

A. That furniture I had ordered a good two months before I went down. That was furniture I was going to put in the cottage and have a living-room instead of a bedroom. It was parlor furniture and I ordered it two months or longer before I went down.

Q. The furniture didn't arrive until you had gone south about the 10th or 12th of November?

A. No.

Q. It came while you were gone down south?

A. Sometime while I was gone.

(Testimony of Miss Miller.)

Q. You claimed that you ordered that before you went south?

A. Oh, yes, long before I went south.

Q. Wasn't that furniture which arrived there while you were down in Seattle, wasn't that for the house of prostitution you were going to start in Sitka?

A. No. It was living room furniture I was going to use in the cottage. I was going to take the bedroom furniture out and with a daveno for the bed just use livingroom furniture.

Q. Now, these services that you were performing for Mrs. Anderson down in Seattle, running around obtaining prostitutes for Sitka; I suppose you had to spend money for entertainment and things of that kind? [52]

A. No, I didn't have to. I got them quick.

Q. In your settlement with Mrs. Anderson did she allow anything for your services? A. No.

Q. You did it out of an act of friendship?

A. I did that while I had my stay in Seattle.

Q. You were interested in getting your actual disbursements back? A. Yes.

Q. When you were talking about this code with Mrs. Anderson did you make it in writing so you wouldn't get mixed up or so there wouldn't be any misunderstanding? A. We discussed it.

Q. It was so simple you didn't need to do that?

A. I don't see why I should have.

Q. How long was Jackie Lugo in the room while you were discussing it? A. A short time.



(Testimony of Miss Miller.)

Q. Did you tell her what the code consisted of?

A. Maude was talking about it. I was surprised because I didn't want her to hear it. I was surprised at Maude discussing such a thing.

Q. Was it secret?           A. Sure.

Q. You didn't want to tell anybody, except to have you and Maude know it?

A. That is right.

Q. Did you happen to think that if you got into court some day it would be your word against Maude's whether it was dresses or girls, when you used those words?

Mr. Tollefsen: I object. That is argumentative.

The Court: Objection be sustained. The question is totally improper.

Q. You have known Mrs. Anderson now since about the time you first went to Sitka, sometime in the spring of 1939 or 1940?           A. Yes.

Q. At this time in November, 1941, was Mrs. Anderson sick, or was she a strong healthy woman at that time?

Mr. Tollefsen: I object to the question as being immaterial.

The Court: I don't think it is material.

Mr. Robertson: It is material as to her mental condition.

The Court: There is no question raised about her mental condition.

Mr. Tollefsen: I think it is immaterial. If you want to discuss it any further, I will be glad to——

The Court: Go ahead with the examination.

(Testimony of Miss Miller.)

Q. Miss Miller, I understood you to say that the conversation between you and Mrs. Anderson was in her private bedroom?      A. Yes.

Q. Was she in bed?

A. Sometimes, and sometimes up.

Q. Was she in her chair?

A. She was not using a chair.

Q. Was she on crutches?

Mr. Tollefsen: We object.

The Court: The Court has ruled on that.

Mr. Monagle: We take an exception.

Mr. Robertson: The witness on the stand testified the conversation took place when Mrs. Anderson was in bed—whether from laziness or sickness—— [54]

The Court: The question of her health is not at issue or her mental condition. She is here in the courtroom and the jury can see her. There is no question raised as to her physical or mental condition. Do you claim her mental condition was bad at the time?

Mr. Robertson: The District Attorney asked the witness and she answered that the plot was made to use the code for bringing these girls up. The testimony will show that Mrs. Anderson was in bad shape. You don't climb in bed to make plots against the Government.

The Court: That is a matter of argument.

Mr. Robertson: It is a matter of veracity.

The Court: I don't think so. The jury is in-

(Testimony of Miss Miller.)

structed to disregard all the conversation about this matter from both sides.

Mr. Robertson: We will take an exception.

Q. Miss Miller, at the time you claim this settlement was made between you and Mrs. Anderson, during the period from about between the latter part of January and early February, 1942, and March, 1942, when you left, was there any receipt passed? A. Oh, no.

Q. No receipt of any kind? A. No.

Q. Not a scratch of a pen of writing?

A. No.

Mr. Robertson: I think that is all.

### Re-direct Examination

By Mr. Tollefsen:

Q. You were asked if it was not true that you left Sitka in [55] March, 1942, because on your arrival you discovered this house Maude Anderson was going to build was not built. Did you know before you came back to Sitka in January, 1942, that the house had not been built?

A. I knew it when I was in Los Angeles.

The Court: What was the answer?

Court Reporter: "I knew it when I was in Los Angeles."

Q. Prior to your return you knew this house was not built? A. Oh, yes.

Q. You were asked whether the two girls, Diana Crawford and Maxine, were going on the plane

(Testimony of Miss Miller.)

to Sitka. I will ask you what arrangement you made with them in Sitka for them to go to Sitka—in Seattle?

Mr. Robertson: We object on the grounds that it is incompetent, immaterial, irrelevant and not binding on the defendant, and it is not in proof of the accusation against the defendant.

The Court: The Court has already ruled on that. It sounds to me like repetition.

Mr. Robertson: We would like an exception.

Mr. Tollefsen: It might be a repetition but it is to clear up a question on cross examination.

Q. I will ask you what arrangement you made with Diana Crawford and Maxine in Seattle for their transportation to Sitka?

A. I made——

Mr. Robertson: We ask to be allowed the same exception.

A. I made arrangements for them to go by plane.

Q. And how much money did you advance to them?

A. I gave one 140 some dollars, and the other 120 some.

Mr. Tollefsen: You may cross examine. [56]

#### Re-cross Examination

By Mr. Robertson:

Q. I suppose you gave that to them in bills, currency I mean?

(Testimony of Miss Miller.)

A. In bills, yes, in currency.

Q. You took that from your own money?

A. Yes.

Q. You actually, of your own personal knowledge, don't know what those girls did with that money, do you?

A. They went back with me and I stayed in the car while they went in to get their tickets.

Q. Where?

A. The tickets—wherever they got them. I am not very well acquainted in Seattle.

Q. You didn't go in yourself at all?

A. No.

Q. You went up to the Pan American Airways Ticket Office, and did you in?

A. I didn't go in. I sat in the car.

Q. Was it the Pan American Airways?

A. It was an Airways. I don't know whether it was Pan American.

Q. You don't actually know what they did inside the office, do you?      A. I do not know.

Mr. Robertson: That is all.

Mr. Tollefsen: That is all.

(Witness excused)

(Whereupon the Jury was duly admonished and Court recessed until 2:00 o'clock P. M., April 5, 1945, reconvening as per recess, with all parties present as heretofore and the Jury in the box; whereupon the trial proceeded as follows:) [57]



(Testimony of Miss Miller.)

Mr. Robertson: If the Court please, I would like the privilege of calling Miss Miller for one question.

The Court: You may call her.

(Whereupon the witness Miller resumed the witness stand.)

Q. (By Mr. Robertson): Miss Miller, this morning both Mr. Tollefsen and I asked you about your having been charged and having plead guilty to a charge of violation of the White Slave or Mann Act, the White Slave Act. I will ask you whether or not what you plead guilty to was the indictment in this suit, #2371-B, where you plead guilty?

A. I don't know the number. I plead guilty to two counts I was charged with.

Q. Is that it (showing File #2371-B to the witness)?

A. Yes.

Q. That is the suit, is it?

A. It is only two counts. I plead guilty to both.

Mr. Tollefsen: The Government will stipulate that this is the suit, the particular action.

Mr. Robertson: That is all, your Honor.

Mr. Tollefsen: That is all.

(Witness excused)

Mr. Robertson: I would like to make a motion, I won't argue it, to strike all of Miss Miller's testimony, and before I state the grounds, if the Court please, I feel the Jury should be excused before I state the grounds of the motion.

The Court: Very well, the Jury will be excused until called. [58]

(Whereupon the Court admonished the Jury, and the Jury retired to the Jury Room.)

Mr. Robertson: Now, I will make a motion, your Honor, to strike all of Miss Miller's testimony relative to what she did in Ketchikan and what arrangements—I mean in Seattle—and what arrangements and transactions and dealings she had with Jean La Rue, or Jean Bowman, as well as the two other women she named, because the only theory upon which her evidence would be admissible would be if she were an agent of a principal, the defendant, and there is no proof nor admission in this case that Mrs. Anderson was her principal, except the allegations of Miss Miller herself, and under the law—I think it is the law—that proof of an agent's acts are not admissible unless there is such admitted principal and agency, or proof established by someone else than declared agent's own testimony, and the Government in offering this evidence made no statement to the Court that it was offered subject to being later tied up or made good. I now move to strike all her evidence upon that ground, your Honor.

The Court (to Mr. Tollefsen): Do you care to be heard?

Mr. Tollefsen: Well, the theory upon which this evidence is offered is that it is the testimony of an accomplice to the crime. Under the Alaska Code such testimony is admissible. Provided it is

admissible, it must later be shown by independent evidence that defendant is connected with the crime. We are not obligated to put on such evidence first, as long as we get some evidence during the course of the trial.

The Court: Is it your theory of the case that the witness [59] Miller is an accomplice or that she acted as agent?

Mr. Tollefsen: It is the Government's theory that she is an accomplice and—well, I wouldn't say necessarily an agency. It is a case of two people in concert, one doing the act, one an accomplice of the first. I don't know whether to define that legally as an agency. That is the Government's theory of it, however.

The Court: Well, in any event, I think the motion is ill-timed. I don't think we have reached a point in the trial of this case where a motion of this kind can be passed on intelligently. The motion will be denied.

Mr. Robertson: We take an exception, but assume your decision is made subject that I may reserve the right to make a motion again, if I find it has not been tied up.

The Court: Yes. Call the Jury.

(Whereupon the Jury returned to the Jury Box.)

The Court: Defendant's motion to strike the testimony of the witness Miller has been denied at this time. Call the next witness.

## OLIVER T. MANSFIELD,

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

## Direct Examination

By Mr. Tollefsen:

Q. Will you state your name please?

A. Oliver T. Mansfield.

Q. What is your official position, if any?

A. I am a Special Agent of the Federal Bureau  
of Investigation. [60]

Q. Are you acquainted with the defendant  
Maude Anderson? A. Yes.

Q. And did you have occasion to be present  
when she was arrested on the charges on which  
she is being tried today? A. I was.

Q. About when was that?

A. That was October—I mean, August 31, 1944.

Q. At that time were you a Special Agent of  
the Federal Bureau of Investigation?

A. I was.

Q. Where did the arrest take place, Mr. Mans-  
field?

A. Mrs. Anderson was arrested by the United  
States Deputy Marshal Mr. Whitmore in Sitka, at  
a house in Sitka, or within the city limits or close  
to the city limits. I am not sure of the exact  
street, but she was apparently living there at the  
time.

Q. You say Mr. Whitmore made the arrest?

A. Yes.

(Testimony of Oliver T. Mansfield.)

Q. Who was with him?

A. I was, and Mr. Anderson.

Q. What, if anything, took place at the time of this arrest?

A. At the time of the arrest, incidental to the arrest a search was made of the premises in which she lived for any evidence that might be connected with this particular case.

Q. Did you ask the consent of the defendant to make that search?      A. Yes.

Q. Did she give her consent?      A. She did.

Q. Did you at that time make a search of this house in which she was living?      A. Yes, I did.

Q. Tell the Jury what, if anything, you found in that search.

A. I was accompanied by Mr. Whitmore and Mr. Anderson. The three of us conducted a search of the premises in which Mrs. Anderson was living at the time she was arrested. At the time of the search various personal papers, or whatever appeared to be personal papers, numerous letters and correspondence of Mrs. Anderson's, or at least correspondence addressed to her, were gone through at the time. In a neighboring room to the room in which she was when arrested, just off what apparently was a sitting room in the house, in a bedstand or a small chest of drawers adjacent to the head of a bed, among other correspondence addressed to her and in a Valentine box, was located a telegram.

Q. At this point I will show you Plaintiff's



(Testimony of Oliver T. Mansfield.)

Exhibit A for Identification, and ask you whether or not this is the telegram you found?

A. Yes, this is the telegram I found.

Q. In whose possession has that been since you wound it?      A. In the possession of our office.

Mr. Tollefsen: I would like to offer this telegram in evidence.

The Court: It will be received.

Mr. Robertson: We object to the admission of the telegram on the grounds that it is not binding on the defendant; it is incompetent, immaterial and there is no proof or any indication of any request for the telegram, or no proof what the telegram might be referring to, and no basis——

The Court: I think there is.

Mr. Robertson: Our contention is that anybody can send [62] a telegram.

The Court: It will be received.

Mr. Robertson: We take an exception.

(Said telegram which was marked Government's Exhibit Number "A" for Identification was admitted and marked Government's Exhibit Number "1" in Evidence.)

Q. Handing you what is now Plaintiff's Exhibit Number "1", I will ask you to read it to the Jury.

A. The telegram is on paper which bears the letterhead "Alaska Communication System, Signal Corps, United States Army." There is a short statement of "Received at 26 WXA B 14 WU." It reads "Seattle Wash Nov. 29 1941 503AM Maude Anderson Lakeview Cottage Sitka Air Mail two

(Testimony of Oliver T. Mansfield.)

dresses today send coat on North Coast"—the "r" in North Coast is typed over anyother symbol. "Need the three badly." Then what appears to be the signature "Marg." There is "922AM" and marks stamped on "Received in evidence, Exhibit No. 1".

Q. You don't need to read that.

The Court: I suggest you show it to the Jury. That is the proper way to do it.

(Whereupon Government's Exhibit Number "1" in Evidence was shown to the Jury.)

Q. You say you found the telegram in a bed-stand or a chest of drawers? A. Yes.

Q. What other items or articles did you find?

A. I mentioned it was among other letters and papers that were there.

Q. To whom were the letters and correspondence addressed? [63]

A. To Mrs. A. M. or Mrs. Maude Anderson.

Mr. Tollefsen: You may Cross Examine.

### Cross Examination

By Mr. Robertson:

Q. Mr. Mansfield, when did the Marshal arrest Mrs. Anderson on that occasion?

A. It was approximately four to five o'clock in the afternoon.

Q. When was the search made?

A. After the arrest was made.

Q. In other words, she was under arrest and

(Testimony of Oliver T. Mansfield.)

in the custody of the Marshal when the search was made?

A. The warrant had been read to her; yes, sir.

Q. Did I understand you to say she gave her consent to the search?      A. Yes, that is correct.

Q. She gave her consent after she was arrested?

A. Yes, she gave oral consent after she was arrested.

Q. Did she give any other consent?

A. She confirmed her oral consent by giving written consent.

Q. Also after she was arrested?

A. Yes, that is correct.

Q. Did you show the telegram to her at that time?

A. I showed the telegram to her at that time, yes. I showed it to her—if you care to have an explanation—I showed it to her in my hand with other papers which appeared to be possibly relevant.

Q. What did you do with the other papers?

A. The other papers are still in the possession of our office.

Mr. Robertson: That is all. [64]

Mr. Tollefsen: That is all.

(Witness Excused.)

MRS. ELVIRA CAVENDER,

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Tollefsen:

Q. Will you state your name please?

A. Mrs. Elvira Cavender.

Q. Where do you live?

A. Hattiesburg, Mississippi.

Q. Are you acquainted with the defendant  
Maude Anderson? A. Yes, I am.

Q. When and where did you become acquainted  
with her? A. In Sitka.

Q. About when was that? A. 1941.

Q. How did you happen to become acquainted  
with her?

A. Well, I came up there to work in her house.

Q. In what capacity did you work in her house?

A. I come in there to work for her.

Q. Did you work there as a prostitute?

A. Yes, I did.

Q. How long did you stay there?

A. I stayed there from April 16, 1941, till  
March 13, 1943.

Q. 1943?

A. Yes. Let me see, I think it was a period of  
eleven or twelve months to be exact—not much  
longer than that. [65]

Q. Are you definite about the date you started?

A. Yes. April 16, 1941.

(Testimony of Mrs. Elvira Cavender.)

Q. You departed in March, 1942?

A. Yes, that would be right. I didn't stay longer than twelve months.

Q. During that time you were working as a prostitute in Maude Anderson's house?

A. Yes.

Q. What sort of financial arrangements were made by you with Mrs. Anderson while you were working there?

Mr. Monagle: We object on the grounds that it is incompetent, immaterial and irrelevant. The defendant is not accused of bringing this witness to Sitka, as I understand it.

The Court: She may answer.

Mr. Monagle: We take an exception.

Mr. Tollefsen: Read the question please.

Court Reporter: "What sort of financial arrangements were made by you with Mrs. Anderson while you were working there?"

A. What do you mean? Do you mean was that my transportation up there?

Q. I am referring to how much you paid for staying there or how much you were paid for working.

A. I paid room and board by the day, and of course there was a certain amount to be given her from each working. A certain amount is taken out of the money we made throughout the day. A certain amount is given to the landlady and we were allowed to keep the rest, and we paid room and board by the day.



(Testimony of Mrs. Elvira Cavender.)

Q. During the time you were there in Maude Anderson's house, what [66] name did you use?

A. Jackie Lugo.

The Court: What? How do you spell it?

A. Jackie L-u-g-o.

Q. Were you living in Maude Anderson's house during the month of November, 1941?

A. Yes.

Q. Were you practicing as a prostitute during that month? A. Yes.

Q. Are you acquainted with Margie Miller?

A. Yes, I am.

Q. Did she ever work at Maude's while you were there? A. Yes, she did.

Q. Do you recall Margie going Outside during 1941?

A. Yes, I do. I remember that very well.

Q. Do you know about when it was she went south?

A. Around the holidays. Towards Thanksgiving and those holidays.

Q. And prior to the time she departed did you hear any discussion between her and the defendant Maude Anderson regarding the procurement of additional prostitutes for this house? A. Yes.

Q. State when and where the discussion was that you heard?

A. I don't know the exact day but it was during the day sometime. I went in there for some change. I was only in there for a matter of not more than two minutes. I heard Maude talking to Margie Miller as to how——

(Testimony of Mrs. Elvira Cavender.)

Q. Just a minute. Where was this conversation?

A. In Maude's bedroom, in her private bedroom.

Q. In the house at Sitka?

A. Yes, in that house at that time. [67]

Q. Who else was present at the discussion that took place?

A. Maude Anderson, Margie Miller, and myself.

Q. Tell the Jury what was said that you overheard.

A. I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember—coats or dresses. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram.

Q. To what were they referring when they were talking about this code?

A. Well, it meant girls to bring up to Sitka.

Mr. Robertson: We object on the grounds that it is incompetent, and immaterial what was meant. I move to strike——

The Court: She can tell what was meant, if she knows.

Mr. Robertson: The objection is to what they meant. She didn't say what they said in the meantime. I move the answer be stricken.

The Court: I think it is responsive to the question. What did they mean?

(Testimony of Mrs. Elvira Cavender.)

Mr. Tollefsen: I will restate the question.

Mr. Robertson: The answer would be mere conjecture on the part of the witness.

The Court: It wouldn't be, if she knew.

Mr. Robertson: She didn't testify if she knew.

The Court: That is what she was asked.

Mr. Robertson: I still object. We take an exception.

The Court: Go ahead with the examination.

Q. Do you know what was meant when they were talking about the code? [68] A. Yes.

Q. What did they say?

A. It was girls. I heard the word "girls" mentioned. I heard it.

Q. Do you recall anything else that was said there or what the discussion was at the time?

A. No. Just about the exchange of what the telegram was supposed to be about clothes and the girls.

Q. Was anything said about when it should be sent?

A. I didn't hear the time when it should be sent. No, I didn't.

Q. At any time in your hearing, at this particular time and place, did Maude ask Margie to procure any girls for her?

A. To me it looked that way.

The Court: Never mind that—just state what was said.

Q. Did she say anything about Margie getting her girls in Seattle that you overheard?

(Testimony of Mrs. Elvira Cavender.)

A. Well, I didn't hear where she would get girls, but I heard that she would get girls and let her know through the wire in the form of clothes.

Q. Do you know a girl named Jean La Rue?

A. Yes, I do.

Q. When and where did you meet her?

A. I met her in Maude's house while I was working there.

Q. Do you know about when that was?

A. She arrived around Thanksgiving.

Q. Before or after Margie Miller had gone south?

A. After Margie Miller had gone south.

Q. What did this Jean La Rue do after she arrived in Sitka?

A. She went and had her examination, which is the general rule of those houses, and come right back to work.

Q. Did she work as a prostitute in Maude Anderson's house? [69]

A. Yes, she did.

Q. How long did she stay there in Maude Anderson's house?

A. She stayed there—I wouldn't know exactly—not longer than two months.

The Court: What?

A. Not longer than two months.

The Court: Did she go to work there, as soon as she arrived, for Mrs. Anderson?

A. Yes, she did.

The Court: As a prostitute?

A. Yes.

(Testimony of Mrs. Elvira Cavender.)

Cross Examination

By Mr. Robertson:

Q. Did you say two months or two weeks?

A. Two months.

Q. Not longer than two months?

A. Not longer than two months.

Q. Where do you live now?

A. Hattiesburg, Mississippi.

Q. You went south in March, 1942, didn't you?

A. I went south June 8, 1944.

Q. When you left Sitka, you left in March, 1942?

A. I left Sitka on June 8, 1944, which is only last year.

Q. I thought you told Mr. Tollefsen you were in Sitka altogether eleven or twelve months; you first arrived in April, 1941, and left in March, 1942?

A. That was the date when I left Maude's house to go work for Ruby Hazelwood. [70]

Q. That was when you moved your place of business over there?

A. I moved from Maude's house to Ruby's house at that time.

Q. You continued doing the business of prostitution until 1944?      A. Yes, I did.

Q. And that was about the time you went to Ruby's house, about the same time Margie left Sitka for good, didn't you?

A. Yes, I believe it was. I couldn't say for sure though.



(Testimony of Mrs. Elvira Cavender.)

Q. Now, you remember quite distinctly when Margie went south in November, 1941?

A. Yes, I remember.

Q. Right up to the day that Margie left Sitka on that occasion, where did she live over in Sitka?

A. Margie—when I was working for Maude—she was working there too in Maude's house.

Q. All the time?           A. Yes.

Q. Don't you remember, as a matter of fact, that Margie left this house of prostitution and had her own little house, her home, where she didn't work as a prostitute for a week or more before she went south in November?

A. I only remember her working in Maude's house while I was there.

Q. How long prior to Thanksgiving do you claim hearing this conversation?

A. Shortly before Margie went south, I am sure.

Q. Shortly—a day or an hour?

A. I couldn't say that. I said before, and answered the District Attorney, that I don't know the exact date.

Q. You were in Maude's private bedroom for about two minutes?           A. That is right.

Q. Did Margie try to conceal or hide from you what she and Maude [71] were talking about at that time?

A. I don't remember. I heard the conversation and went right out.

Q. You were getting change from somebody?

(Testimony of Mrs. Elvira Cavender.)

A. Yes.

Q. Who? A. Maude.

Q. They talked on while Maude made change for you? A. Yes.

Q. You didn't hear any other talk about Margie getting some girls, between Maude and Margie, except on that occasion?

A. That is the only time.

Q. Where was Maude at that time in the bedroom?

A. She was sitting down in a chair.

Q. Did you see any code written out at that time? A. No, I didn't.

Q. Now then, you say Jean La Rue worked there in this house, the same house where you were working, was it? A. Yes.

Q. For about two months?

A. Yes, I said not longer than two months.

Q. Then she left? A. Yes.

Q. Where did she go?

A. To Ruby's house.

Q. The same house you went to the following March? Is that right? A. Yes, that is right.

Q. Did you have any correspondence with Margie while Margie was down south?

A. No, I didn't.

Q. Did you know that Margie's home address was down in Los Angeles? [72]

A. When she was down south which time do you mean?

Q. This occasion when she was away from Sitka

(Testimony of Mrs. Elvira Cavender.)

from November, 1941, up until the latter part of January or early February.

A. I didn't have any correspondence with her.

Q. You knew her Los Angeles address though?

A. I don't know her Los Angeles address.

Q. You never knew it? A. No, I didn't.

Q. How long have you known Margie Miller?

A. I have known her for quite a long time.

Q. How many years?

A. Well, I met her in Los Angeles.

Q. In her home in Los Angeles? A. No.

Q. Where did you meet her?

A. In a house of prostitution.

Q. You know her sister too? A. Yes.

Q. She takes care of your child?

A. She did at that time.

Q. You and Margie are pretty close friends, aren't you?

A. Yes. Not too close. I don't correspond with her regularly as I did with her sister, because her sister was taking care of my child.

Q. Is she the one who persuaded you to come up as a witness in this case? Did Margie persuade you to become a witness in this case? A. No.

Q. You paid room and board. This money you paid when you were working there in Maude Anderson's house, you actually paid [73] to Margie?

A. For room and board?

Q. Yes. A. I should say not—to Maude.

Q. Wasn't Margie running it?

A. Maude was running it then.

(Testimony of Mrs. Elvira Cavender.)

Q. Margie didn't collect?

A. She was working as one of the prostitutes.

Q. She was not running it? When did she run it?      A. I don't remember.

Q. Before that, was it?

A. While I was working in Maude's house, when I first came up, she was working as one of the girls.

Q. Who?      A. Margie Miller.

Q. Before she left in November, 1941, she wasn't living in that house at all?      A. I don't know.

Q. You don't recall?      A. I don't recall.

Q. Before that, November, 1941, you and the other girls were paying the money to her and not Maude Anderson, weren't you?

A. I was paying my room and board money to Maude Anderson.

Q. You are positive of that?

A. Yes, I am.

Q. I think that is all. Who originally brought you to Alaska?

Mr. Tollefsen: We object to that as being immaterial.

The Court: Yes, that is going too far afield.

Mr. Robertson: It is material if it shows that the Government witness brought her up. [74]

Mr. Jernberg: We object to that in front of the Jury.

Mr. Robertson: If it is that, it is certainly material.

The Court: I don't see how it is material in

(Testimony of Mrs. Elvira Cavender.)

any respect. She is not on trial. We are not going off on any fishing expedition like that.

Re-direct Examination

By Mr. Tollefsen:

Q. Mrs. Cavender, why did you come here to testify?

A. Why? Because I had truth to tell.

Q. Who asked you to come to testify?

A. I was subpoenaed by the Government.

Q. You came in answer to that subpoena, didn't you?

A. Yes, I did.

Mr. Tollefsen: That is all.

Re-cross Examination

By Mr. Robertson:

Q. I would like to ask a question, Jackie. At the time that Margie left for the States about Thanksgiving, 1941, did you know before she left that she intended upon her return to establish her own house of prostitution in Sitka?

A. Yes, I believe that Maude was supposed to let her have a house.

Q. Did you know she was going to the States to buy furniture for that house?

A. No, I don't know that.

Q. Do you know that the furniture came to her in Sitka after she left Sitka in November, 1941, and before she got back? [75]

A. I don't recall that.

Mr. Robertson: That is all.

Mr. Tollefsen: That is all.

(Witness excused.)



GLORIA VIRGINIA KNAPP BOWMAN,

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Tollefsen:

Q. Will you state your name, please?

A. Gloria Virginia Knapp Bowman.

Q. Where do you live?

A. 8503½ Aurora Avenue, Seattle, Washington.

Q. How old are you?           A. Twenty-one.

Q. Are you acquainted with Maude Anderson?

A. I am.

Q. Are you acquainted with Margie Miller?

A. Yes.

Q. Tell the Jury about the time and place and the circumstances under which you first met Margie Miller.

A. I met her the latter part of November, 1941.

Q. Where?

A. At the Atwood Hotel, through Billy Day.

Q. In what city is that?       A. Seattle.

Q. What were the circumstances under which you met her?

Mr. Robertson: We object on the ground that it is incompetent, [76] irrelevant and immaterial, and not binding on the defendant.

The Court: She may answer.

Mr. Robertson: Exception.

A. Well, I was brought to the hotel by Billy Day and she was there.

Q. What transpired at that time?

(Testimony of Gloria Virginia Knapp Bowman.)

A. She asked me if I wanted to go to Alaska.

Mr. Robertson: I will renew my objection on the grounds that it is incompetent, immaterial and irrelevant, and transpired in the absence of the defendant.

The Court: Answer the question.

Mr. Robertson: Exception.

A. She gave me \$70.00, and I bought a ticket on the North Coast to Sitka, Alaska, and left the next day for Sitka.

Q. What were you going to Sitka for?

A. To work in a house of prostitution.

Q. Any particular house?

A. Yes. Maude Anderson's.

Q. Did you actually go on the North Coast?

A. Yes, I did.

Q. Did you actually go to Sitka, Alaska?

A. I did.

Q. What name did you travel under on this trip?

A. Jean La Rue.

Q. When did you arrive in Sitka, do you recall?

A. No, I don't recall the exact date, but it was the latter part of November—almost December.

Q. What year?

A. 1941. [77]

The Court: "Almost" what?

A. Almost—I was there by December of 1941.

Q. Upon your arrival in Sitka what did you do?

A. I went directly to Maude Anderson's.

Q. How did you find the place?

A. The cab driver took me there.

Q. What happened when you arrived at Maude Anderson's.

(Testimony of Gloria Virginia Knapp Bowman.)

A. I went in the door, and she said, "Are you the girl from the States?" I said, "Yes," and she showed me my room and sent me down to the doctor's.

Q. This room you occupied—was there anything unusual about that room?

A. It was a new room.

Q. Was anything said about whether she was expecting you?

A. Expecting me?

Q. Yes.

A. She said was I the new girl from the States. That would sound like she was expecting me.

Q. What did you mean—"a new room?"

A. Newly built. It was newer than the rest of the house.

Q. You say you went down to the doctor at her direction?

A. Yes.

Q. What happened at the doctor's.

A. I had an examination.

Q. What did you do subsequent to that?

A. I went to the Police Station and registered with them.

Q. By whose instructions did you go to the Police Station?

A. By Maude Anderson's.

Q. What did you do subsequent to that, after going to the Police Station? [78]

A. I went back to Maude Anderson's place.

Q. All that occurred on the same day you arrived in Sitka?

A. Yes.

Q. After you returned to Maude Anderson's from the doctor's and the Police Department, what did you do?

A. I went to work.

(Testimony of Gloria Virginia Knapp Bowman.)

Q. You "went to work." What do you mean by that?      A. I don't know—prostitution.

Q. Did you work as a prostitute in the house of Maude Anderson's?      A. Yes.

Q. How long did you stay there?

A. A month. Just a little over maybe.

Q. During the time you were there what name did you use?      A. Jean La Rue.

Q. How old were you at the time you arrived in Sitka?      A. I was seventeen.

Q. What financial arrangement was there between you and Maude, if any, during the time you practiced prostitution in her house?

Mr. Robertson: We object on the grounds that it is incompetent, immaterial and irrelevant, and not proof of the charge.

The Court: Answer the question.

Mr. Robertson: Exception.

A. Down in Seattle I received \$70.00 or close to it from Margie Miller and I was supposed to pay Maude Anderson.

Mr. Robertson: We object.

The Court: That is not responsive.

Q. What financial arrangements were there with regard to your working for Maude?

A. Two dollars a day for board and room, and a third of what I made. [79]

Q. To whom did you pay those amounts?

A. Maude.

Q. And how long did you say you stayed there at Maude's house?      A. A little over a month.

Q. Where did you go from there?

(Testimony of Gloria Virginia Knapp Bowman.)

A. Down to Ruby's. I don't know her last name.

Q. At any time did Maude ever mention the money advanced to you for transportation?

A. Yes.

Q. When and where was that?

A. Before I left.

Q. About when?

A. Close to the time before I left her.

Q. When did you say? Before you left her house or Sitka? A. Before I left her house.

Q. Around about that time? A. Yes.

Q. And what was it she said about this money?

A. She just wanted me to pay her the money back.

Q. At the time Maude requested you to pay this money to her, which was advanced for transportation, was Margie Miller back in Sitka at that time? A. No.

Q. Was she back since the time you arrived?

A. No.

Q. When, if ever, did you leave Sitka?

A. I left Sitka the 16th or 17th day of February in 1942.

Q. Have you ever returned since then?

A. I have not.

Q. Have you ever practiced prostitution since that time? [80] A. I have not.

Mr. Tollefsen: You may Cross-Examine.



(Testimony of Gloria Virginia Knapp Bowman.)

Cross-Examination

By Mr. Robertson:

Q. Now, Jean, you say you left February 17, 1942, and ceased the occupation of prostitution?

A. Yes, I did.

Q. But when you moved from Maude Anderson's house down to Ruby Hazelwood's it was not because you were ceasing that business, was it?

A. No. I moved down there on the first of January.

Q. In other words, you were just——

Mr. Tollefsen: We object——

Mr. Robertson: If the Court please, I have a right to find out whether something happened, if her leaving Maude Anderson's was for something she did.

Mr. Tollefsen: In other words, you mean this——

The Court: Reframe your question.

Q. You say you were seventeen years old when you arrived there in December, 1941. Is that correct?

A. That is correct.

Q. What age did you give to the police when you registered there?

A. Twenty-one or twenty-two. I am not sure.

Q. Didn't you tell the police at that time that you were twenty-four years of age?

A. Perhaps I did. I don't remember exactly.

Q. You voluntarily concealed your age, did you not?

A. Yes. [81]

(Testimony of Gloria Virginia Knapp Bowman.)

Q. This Billy Day took you up to Margie's, is that correct?      A. That is right.

Q. Who is Billy Day?

A. Just a fellow. I don't know.

Q. Some man down there?      A. Yes.

Q. You went up to Margie's one afternoon in the Atwood Hotel in Seattle?

A. That is right.

Q. You left on the North Coast how soon after that?      A. The next morning.

Q. Did you have to a travel permit at that time?      A. No.

Q. What did you do about your children?

A. I have no children.

Q. Didn't you tell the police in Sitka when you registered that you had two children?

A. I don't recall that.

Q. But you don't have children?

A. I never had any children.

Q. You worked in this house, Maude Anderson's house, for about a month; is that right?

A. Yes.

Q. You had a taxi-man who took you right up to that house the minute you got off the North Sea?

A. That is right—the North Coast.

Q. Who admitted you to the house?

A. I don't remember.

Q. It wasn't Mrs. Anderson?

A. I don't know. I think it was. I couldn't tell you. [82]

Q. Isn't it a fact, Jean, you didn't see Mrs. An-

(Testimony of Gloria Virginia Knapp Bowman.)  
derson that day until after you got in the house and got in her private bedroom?

A. You're wrong. Fifteen minutes after I came there——

Q. Where?           A. In her bedroom.

Q. Her private bedroom?           A. Yes.

Q. Did she say anything at that time about your repaying the \$70.00?

A. Not at that time.

Q. The first time she spoke about the \$70.00 was when you told her or gave an indication that you were going to move to Ruby's house?

A. That is right.

Q. That is the time you claim that Mrs. Anderson asked you to repay the \$70.00 Margie Miller gave you down south?           A. Yes.

Q. Did you have any correspondence with Margie Miller in the meantime?           A. No.

Q. Had you heard from her in any way?

A. I did not.

Q. You didn't pay any money back to Mrs. Anderson, did you?

A. I paid no money to Mrs. Anderson.

Q. And you never have?

A. Except just the third of what I made.

Q. Did that include any of the money which paid your way from Seattle to Sitka?

A. No. [83]

Q. Did you pay Margie back?

A. Most of it.

Q. When?

A. When I was working in the Middle House.

(Testimony of Gloria Virginia Knapp Bowman.)

Q. What is that?

A. That is all I ever called it.

Q. You said you worked in what you call Maude Anderson's and Ruby's, and another one?

A. Yes, the Middle House. There were three.

Q. When did you work there?

A. I worked there—when I got married I quit work—that was after I left Ruby's.

Q. Since you left Sitka definitely in 1942—right afterward, you mean—sometime in February, 1942?

A. When I was working in the Middle House?

Q. Yes. A. Yes.

Q. Do you know when Margie returned from Seattle to Sitka from that trip?

A. I don't recall the date.

Q. Shortly after her return from that trip did you make refund to her?

A. Yes, in a matter of a few days.

Q. And you paid part of it back? A. Yes.

Q. You still owe her, Margie Miller, part of the money, do you? A. Yes, I do.

Q. Did Margie tell you down there—how long did you talk to Margie in the Atwood Hotel when Billy Day had taken you there?

A. Not more than half an hour. [84]

Q. Did she tell you at that time that a new house was being built for her in Sitka? A. No.

Q. She didn't mention it at all?

A. She didn't mention it at all.

Q. Did she tell you she wanted you to work for her? A. No.

(Testimony of Gloria Virginia Knapp Bowman.)

Q. You never heard anything of that kind there?      A. No.

Q. When Billy Day was taking you up there, did he tell you you were going to meet Margie?

A. No, he didn't tell me until we arrived there.

Q. Where were you living in Seattle?

A. I was living with my mother.

Q. Billy Day came to your mother's house to get you to become a prostitute?      A. Yes.

Q. Wasn't it after you reached Sitka and Mrs. Anderson's that you first determined to become a prostitute?      A. No.

Q. You went from Seattle to Sitka to become a prostitute?      A. That is right.

Q. Nothing whatever Mrs. Anderson might have said induced you to become a prostitute, did it?

A. No.

Q. At the time you were talking, when Billy Day took you to Margie Miller's, in her room at the Atwood Hotel, who else was in the room besides Margie Miller and Billy Day and yourself?

A. No one. [85]

Q. No one?      A. Just the three of us.

Q. At any time while you were there?

A. No.

Q. After you reached Sitka, I will ask you if you didn't tell the police that you had two children?

A. I don't recall saying that.

Q. Didn't you tell the police that you had twins, but one or both of them lost their lives in a fire in Seattle?      A. I don't recall saying it.

Q. Did you tell Lulu Coleman or Violet Roland



(Testimony of Gloria Virginia Knapp Bowman.)  
that you had children, twins, and one or both of them lost their lives in a fire in Seattle?

Mr. Tollefsen: We object.

The Court: The objection is well taken. That has no pertinency to this case, even if she had forty children.

Mr. Robertson: I think that is all, your Honor.

Mr. Tollefsen: That is all.

(Witness excused.)

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HENRY GREEN,

called as a witness on behalf of the Government,  
being first duly sworn, testified as follows:

Direct Examination

By Mr. Tollefsen:

Q. Will you state your name, please?

A. Henry Green.

Q. What is your occupation?

A. Agent for the Northland Transportation Company. [86]

Q. Were you an agent for the Northland Transportation Company in December, 1941?

A. I was.

Q. Handing you this paper, I will ask you if you have ever seen that before?

A. Yes, I have.

Q. Is that part of the official records of your Company in Juneau?           A. It is.

(Testimony of Henry Green.)

Q. I will ask you if that is not a passenger manifest of the Steamship North Coast, Voyage 68 North?      A. Yes.

Q. Is that what it is, Mr. Green?      A. Yes.

Mr. Tollefsen: At this time I would like to offer this passenger manifest into evidence.

Mr. Robertson: I would like to know what the purpose of it is.

Mr. Tollefsen: If you want me to make a statement—I offer to prove by this manifest that one, Miss Jean LaRue traveled on the Steamship North Coast on Voyage 68 North from Seattle to Sitka on the trip which arrived in Juneau the 3rd of December, 1941.

Mr. Robertson: If the Court please, had Miss La Rue so testified, but I believe this manifest, unless Mr. Green can testify personally, the manifest isn't truth of—

Mr. Tollefsen: It is evidence of the fact that if it is an official record of the Company.

The Court: He has already testified it is part of the official record of the Company.

Mr. Tollefsen: I offer this document into evidence. [87]

Mr. Robertson: We object. It shows on the face of it that it is a carbon copy. We object to its introduction.

Mr. Tollefsen: I don't believe—if it part of the official record of the Company, it don't matter.

The Court: I don't see any particular reason for it. There is no dispute of her testimony that

(Testimony of Henry Green.)

she arrived the first of December. It isn't material whether——

Mr. Tollefsen: We considered it necessary to corroborate her testimony.

The Court: It will be received for whatever it is worth.

Mr. Robertson: We take an exception, if it may please the Court.

(Whereupon said passenger manifest was admitted and marked Government's Exhibit Number "2" in Evidence, and reads as follows:)

## GOVERNMENT'S EXHIBIT No. 2

SS North Coast V-68-N

Arriving Juneau 12/3/41

For Juneau: Miss Eunice Hanson, Mrs. Everett Wrede, Baby Wrede, Mrs. Grace Purdue, Mrs. Alex Zidio, Mr. E. F. Herr, Mrs. E. F. Herr, Mr. E. J. Hesse, Mrs. C. F. Wyller, Mstr. Fred Wyller, Miss Eliz. Wyller, Mrs. M. F. Benedict, Mr. M. F. Benedict, Miss Marilyn Benedict, Mr. Wm. Risse, Mrs. Wm. Risse, Mr. Mack Mori, Mr. Andy Day, Mr. Leonard Taylor, Mr. A. Van Mavern, Mr. W. J. Atkinson, Mr. R. J. Lane, Mr. Chas. Wright.

For Sitka: Mr. Frank D. Gibbons, Mrs. Frank D. Gibbons, Mr. Harold Gibbons, Miss G. Martin, Mrs. James Sherman, Mrs. J. J. Culbert, Miss Jean LaRue, Mrs. Robert LaJoie, Mr. C. A. Sanderson, Mrs. C. A. Sanderson, Mr. B. Brunk, Mr. Jack A. McClung, Mr. Pat O'Donnell, Mr. Walter O. Kraft,

(Testimony of Henry Green.)

Mr. James L. Shults, Mr. James L. Suddath, Mr. Ray R. Enlow, Mr. Lee Nyhagen, Mr. Al Kennedy, Mr. Al Pedersen, Mr. R. A. Evenson, Mr. Ernest Bennett, Mrs. Ernest Bennett, [88] Mrs. Patricia Craig, Mrs. Billy Martin, Mrs. Ethel Edwards, Miss L. M. Mills, Mr. Neill Andersen, Mrs. Neill Andersen, Miss Thelma Diimell, Mrs. R. A. Dimmell, Mr. Lloyd Norton, Mr. Elton Diimmell, Mr. Lester Hobert, Mrs. Lester Hobert, Mr. D. L. Polwert, Mr. Vern L. Freeman, Mr. Nels Drugg, Mr. Wm. G. Harsein, Mr. Roy Harsin, Mr. Owen Rye, Mr. Gilbert Tonge, Mr. R. Westover, Mrs. R. Westover, Mr. Frank Perez, Mr. C. E. Peck, Mrs. C. E. Peck, Miss Johanna Peck, Mr. Cyrus Peck, Mrs. H. Wagner, Miss Francene Wagner, Mr. J. V. Boldrick, Mrs. R. J. Shurratt, Mr. G. Elsemore, Miss L. Elsemore, Mr. A. J. Baker, Mrs. A. J. Baker, Mr. R. J. Lane, Mr. Benson Johns, Mr. Gilbert Stone, Mr. Malfred Soley, Mr. Lloyd Davis, Mr. P. L. Wilmarth.

/s/ H. E. GREEN.

### Recapitulation

	1st	Stg.
Juno .....	20	2
Sitka .....	57	6
	—	—
Total .....	77	8

A. J. Borkland, Master.

Paul E. Richers, Purser.

Mr. Tollefsen: You may Cross-Examine.

(Testimony of Henry Green.)

Cross-Examination

By Mr. Robertson:

Q. Do you personally know each one of the passengers who traveled from the port of embarkation to the port of debarkation on that list?

A. No.

Re-direct Examination

By Mr. Tollefsen:

Q. When would the next previous voyage of the North Coast have been?

A. I can't tell you that accurately unless I was down at the [89] office and looked up the record.

Q. How often did that boat make a voyage?

A. About every two weeks.

Mr. Tollefsen: That is all.

(Witness excused.)

Mr. Tollefsen: At this point, your Honor, the Government rests.

(Recess.)

Mr. Robertson: If the Court please, before putting evidence in, I would like to renew my motion and add a little to it.

The Court: The Jury will be excused until called.

(Whereupon the Court admonished the Jury, and the Jury retired to the Jury Room.)

Mr. Robertson: The defendant now moves to strike all the testimony of the witness Margie Mil-



ler, relative to the alleged conversation between herself and the defendant in Sitka, and also to her transactions, dealings and conversations with Jean La Rue or Bowman, and other persons in Seattle, upon the ground that whether or not Margie Miller is produced as a witness and gave her testimony on the theory that she was an agent of the defendant or an accomplice of the defendant, that there is no corroborating evidence to sustain her testimony, and that under the law as to agency the declarations of an agent, to which she claims she is making them, or acts done on behalf of a principal, unless there is an [90] admission of the principal to the existence of a relationship of principal and agent by the principal, or else that there is other competent proof than the evidence offered by the agent, and that she be treated as an accomplice. "A conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission." Section 5352, Compiled Laws of Alaska, 1933. And the principle of agency is in 22 Corpus Juris at Page 37. We submit at this time that there is no such corroborating evidence, that the only possible evidence that there is in circumstantial evidence and the circumstantial evidence is very slight, if of any weight whatsoever; that Jean La Rue testified that it was fifteen minutes after she had entered this house in Sitka before she talked to Mrs. Anderson, and the only way she

sought to tie Mrs. Anderson up with Margie Miller was by saying that Mrs. Anderson said in substance, as I recall her testimony, "Oh, are you the new girl who has come from Seattle?" There is no evidence whatsoever as to what that meant—even though it now stands admitted that if Mrs. Anderson did make such a statement, it hasn't been corroborated—or that the source of that information couldn't have been ascertained by Mrs. Anderson other than from the fact of a dealing between herself and Margie Miller. Furthermore, Jean La Rue herself says when she left this house about a month after she had been in it, up to that time Mrs. [91] Anderson had never asked her to pay any transportation, then she claims a month later, more than a month, probably six weeks after the alleged commission of the crime, that Mrs. Anderson asked her to make refund of this \$70.00. She made no statement in her evidence as to why or the reason, if any, Mrs. Anderson assigned as to why, but just said in substance that she wanted her to repay \$70.00 which Margie Miller advanced for her transportation from Seattle. The other woman, Jackie Lugo,—her only testimony is testimony that she entered the private bedroom of Mrs. Anderson for two minutes and while there she heard them—Mrs. Anderson and Margie Miller—talking about arranging some kind of code and understood it was something about girls. That was the only positive evidence she gave. The telegram itself is no evidence and none was brought in, except by inference, as to why that telegram couldn't mean exactly as to what it reads. There is no evidence that Mrs. An-

derson ever saw that telegram or had that telegram, except that Mr. Mansfield testified he and Mr. Whitmore found it, if I understand correctly, inside a Valentine box or Valentine envelope, I took it, in a bureau drawer of some dressing table or something of that kind, in one of the rooms in Mrs. Anderson's house, and I submit to your Honor, that is not the kind of evidence required to corroborate an agent or accomplice, before the principal can be convicted of an alleged commission of a crime in which the agent was principally acting, and I think the Court will take judicial notice that the agent has plead guilty before this Court, that she committed the crime of furnishing the transportation, [92] your Honor.

The Court: Sorry, but the Court does not agree with any part of your interpretation of this evidence. The witness Miller testified that she had an arrangement with the defendant to send some girls from Seattle and that she arranged that she would wire in code as to what she did. She explained to the Court and Jury what the code was like. She later identified the telegram which she said she sent to the defendant, and the telegram itself was later found in the bedroom of defendant among her personal and private papers. The last witness on the stand, Gloria Bowman, testified she met the witness Miller in her room at the Atwood Hotel and pursuant to that made arrangements and talked to her about coming up here to work for Maude Anderson as a prostitute in Sitka, in Mrs. Anderson's house of prostitution; that she left to come up here the next morning; that as soon

as she got off the boat she ordered a cab driver to take her to Mrs. Anderson's place, and went in the house and Mrs. Anderson, without any prompting or intervention from anything or anybody said, "Oh, yes, you are the girl from the States," and ordered her down to have a physical examination and to go and register with the police the same day, and she came back and went to work as a prostitute the same day as she arrived. That is the evidence in substance. The evidence of the last witness alone is enough to take the case to the Jury. The motion will be denied.

Mr. Robertson: We will take an exception, your Honor.

The Court: Call the Jury.

(Whereupon the Jury returned to the Jury Box.) [93]

### DEFENDANT'S CASE

Mr. Robertson: At this time I would like permission to call a witness, who is desirous of getting on the boat for Sitka, out of order, for corroborating and particularly impeaching testimony. Otherwise he will have to stay over until the next boat.

Mr. Jernberg: No objection.

The Court: You may call him.

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### CLARENCE RANDS,

called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:



(Testimony of Clarence Rands.)

Direct Examination

By Mr. Monagle:

Q. Mr. Rands, will you state your name?

A. Clarence Rands.

Q. Where do you reside? A. Sitka.

Q. How long have you resided there?

A. A little over six years.

Q. What is your occupation?

A. Building contractor.

Q. In your course of your occupation, some time during the year 1941, did you have any business dealings with Maude Anderson?

A. Yes, I did.

Q. And did she employ you to do any work for her? A. Off and on for quite some time.

Q. Did she employ you, or rather arrange with you in an effort to, or with the view of making a contract for the construction, or putting additions to a place she owned near Lake View Cottage in Sitka? [94]

A. Yes, we talked over plans.

Q. During the course of this conversation and arrangements being made for the addition, were you informed what the purpose of it was?

Mr. Tollefsen: If the Court please, I would like to invoke the rule of setting the time and place and who was there.

Q. I asked first if he had any. First I will ask you if you had any conversation, at any time or place, in the year 1941, in connection with the construction of a building or additions to the building? A. Yes, sir.



(Testimony of Clarence Rands.)

Q. When and where did it take place?

A. It took place up at her house.

Q. Who was there?

A. I don't recall if any other party was there besides Mrs. Anderson and myself, or not.

Q. You don't recall anybody else being there?

A. At the time of the discussion, I don't remember. Margie Miller was there but at that particular moment I don't recall. I did talk about it with her.

Q. Did you have any discussion in the fall of 1941 in connection with the placing of an addition to one of these buildings, when Maude Anderson and Margie Miller were both there?

Mr. Tollefsen: I object. That is very leading. Usually counsel asks a witness when it was—he is putting words in his mouth.

The Court: Yes. Let the witness testify.

Q. Just inform the Court all the conversations you had, the dates on which you had the conversations with Maude Anderson when [95] Margie Miller or anybody else was there, in connection with the placing of an addition to the building next to the Lake View Cottage.

A. Seems like it was in the fall of 1941. I don't recall just what month, whether it was before November or not. I built and done repairs on quite a bit of her property and one time we talked about what I thought it would cost to remodel the small place, which was possibly 14 by 20, enlarge it and build a few rooms in addition. She had the

(Testimony of Clarence Rands.)

idea of leasing it. I made a pencil sketch but never a cost figure.

The Court: Who was this conversation with?

A. Mrs. Anderson.

Q. Did Margie Miller ever talk to you about the same work you talked to Mrs. Anderson about?

A. Yes, I talked to Margie about it.

Q. At the same time or a different time?

A. There might have been a day or two difference.

Q. In other words, the fall of 1941?

A. All the same period.

Q. What did Margie Miller say, if anything, about this addition to the building?

Mr. Tollefsen: If the Court please, I don't see that it is material. I object on the grounds that it is incompetent, irrelevant and immaterial, and not pertaining to the issues of this case.

Mr. Monagle: It corroborates one of the Government witnesses. Margie Miller by her own testimony said it was for a place of her own. It impeaches Jackie Lugo. She said Margie didn't intend to.

The Court: What are you offering it for? [96]

Mr. Monagle: I am offering it for the purpose of impeaching Jackie Lugo.

Mr. Tollefsen: If the Court please, I don't see how the statements of another witness can be used for impeachment of a third witness.

The Court: I don't either.

(Testimony of Clarence Rands.)

Mr. Tollefsen: I never heard of anything like that.

(Respective attorneys and Court Reporter approached the Bench, out of hearing of the Jury.)

Mr. Monagle: As I said, we are calling this witness out of order to corroborate the testimony of Mrs. Anderson, and the Government witness Miller admitted it. Mr. Rands can certainly corroborate——

The Court: You want to corroborate Maude Anderson's testimony?

Mr. Tollefsen: He can't by what another party said to this man.

Mr. Monagle: And also Mr. Rands can testify to the fact of what Margie Miller said about not getting the place. That is the foundation. She told him and two other witnesses that she didn't get the place, and proves——

Mr. Tollefsen: You can't bring in a conversation between Rands and anybody else.

Mr. Monagle: Then there is no way of impeaching a witness. She denied saying that she was going to get Maude if it would take the rest of her life. I am laying the foundation that it was to be built for her but she didn't get it.

The Court: He testified there was talk of building an additional room on the house she lived in. What relevancy [97] does that have to this case?

Mr. Monagle: It shows that Margie goes to him and says she is going to get even with this woman

(Testimony of Clarence Rands.)

because she promised to build a place for her and now she does not.

The Court: Can you get him to show that?

Mr. Monagle: Not without laying a foundation.

The Court: I don't think so, not in this stage of the game.

(Respective attorneys and Court Reporter left the Bench and were again within hearing of the Jury.)

The Court: The offer will be denied.

Mr. Monagle: We will take an exception.

Q. Did Margie Miller ever arrange with you at any time, Mr. Rands, to talk to you about a place of business for herself in Sitka?

A. No. I have never talked with her about that.

Q. Did Margie Miller ever talk to you in Sitka some time in January of 1942, after coming back from Seattle, or February 1942, about an arrangement between her and Maude Anderson in connection with the occupation of a place used for prostitution?

Mr. Jernberg: I object. I don't know the purpose, unless it is for impeachment.

Mr. Monagle: The question was about the construction of a building.

The Court: The witness said he never talked to Margie Miller about that. The question was asked and he said, "No."

Mr. Monagle: This is about a conversation which took place because the building wasn't built. I am asking if, after she came back, there was an arrange-

(Testimony of Clarence Rands.)

ment had [98] with Maude Anderson because it was not built. That is the question.

The Court: You may ask him. We are not going on any tangents in this matter.

Q. Did you and Margie Miller, or she ever make any statement to you against Maude Anderson because of the fact that her arrangements with Maude Anderson about the construction of a building for the use of prostitution was not complied with?

Mr. Jernberg: I object to that type of question. It is absolutely leading.

Mr. Monagle: The answer is "Yes" or "No".

Mr. Tollefsen: I object to any further leading questions and ask the Court to admonish counsel to frame his questions in——

The Court: I think if you let the witness——

Mr. Robertson: It is not leading. It is based upon the impeaching question which I asked Miss Miller while she was on the witness stand. This question is simply asking Mr. Rands "Yes" or "No" if he had any such conversation with her. It is the only way to bring it out. The impeaching question was asked on that very point.

The Court: It isn't the same thing. In order to save time, let him answer the question.

A. Yes, I have.

Q. You did?           A. Yes.

Q. When was it? When was it the conversation took place?

A. I don't recall the exact date. It was after she come back from the south, probably in January



(Testimony of Clarence Rands.)

or February of the next year. That is when she come back from the States. [99]

Q. Where was Margie Miller living at that time?

A. A little house two doors from the house of prostitution.

Q. What, if anything, did she say in reference to Maude Anderson?

The Court: Exactly what was said in this conversation?

A. Well, Margie was quite peeved and put out because the little house she figured on building wasn't built. I knew there was some riff between Margie——

The Court: Never mind. Tell what was said.

A. She said she figured it would be built when she got back and it wasn't and that she—I asked her what she was going to do and she said probably she would have to be a mistress in this house or something.

The Court: What?

A. A mistress in this house that she had been working at. That was all.

The Court: Was that all that was said?

A. Yes, sir.

The Court: What house are you talking about? The house she was living in?

A. No. I figure the house was in between the house she was living in and the house we were going to remodel—it was in between the house we were going to remodel and the two houses.

(Testimony of Clarence Rands.)

The Court: Is that all?

Mr. Monagle: That is all, if the Court please.

Cross Examination

By Mr. Jernberg:

Q. What time is your boat leaving?

A. Supposedly four o'clock. [100]

Q. You are also in the insurance business in Sitka, are you not? A. Yes.

Q. Do you have Mrs. Anderson's property insured? A. I do.

Q. For how much?

A. I imagine the several buildings total around \$12,000.00.

Q. That is all. One more question. How long have you known her, Clarence?

A. A little over six years.

Q. Ever since you have been in Sitka?

A. Yes.

Q. During that time you have done considerable contract work for her? A. Yes, sir.

Q. How many houses does she own, if you know?

A. About five.

Q. You are also City Assayer?

A. I was at one time.

Q. You have done considerable work for her over the course of time you have known her, is that correct? A. Yes, sir.

Q. That is all.

Mr. Monagle: That is all.

(Witness excused) [101]

## MAUDE ANDERSON,

the Defendant, called as a witness on her own behalf, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Monagle:

Q. Will you state your name, Mrs. Anderson?

A. (Witness remaining in her wheelchair, which was placed in front of the witness stand): Maude Anderson.

Q. And how long have you lived in Alaska, Mrs. Anderson?

A. I have been up here since 1926.

Q. Are you married?

The Court: How long?

A. I came up in 1926.

Q. You are married?

A. I was married in 1929.

Q. How old are you, Mrs. Anderson?

A. Forty-nine years old the first of February.

Q. Of this year?           A. Yes.

Q. What does your husband do?

A. He is a troller.

Q. A fisherman, a troller. Where do you live?

A. Sitka, Alaska.

Q. How long have you lived in Sitka?

A. Since 1929.

Q. Now, you heard the testimony of Margie Miller, in which she testified that she had a conversation with you before leaving for Seattle in the fall of 1941?           A. I heard it.

(Testimony of Maude Anderson.)

Q. How long have you known Margie Miller?

A. She came up in 1940. [102]

Q. She came to Sitka in 1940? A. Yes.

Q. And you have known her at all times since then? A. Yes.

Q. Did you and Margie Miller have a conversation at the time Margie Miller testified a conversation was held between you and she?

A. We did not.

Q. Did you have any conversation at any time with Margie Miller just prior to her departure for Seattle in the fall of 1941? A. I did not.

Q. Now, did you make any business arrangements with Margie Miller in Sitka when she was there in the fall of 1941? A. No, sir.

Q. Was there any conversation between you and Margie Miller at any time in Sitka in the fall of 1941 with reference to her going to Seattle for some purpose?

A. No, I did not. I was going to let her have one of my places.

Q. Did you have any conversation with her about having one of your places in Sitka?

A. Yes.

Q. When was that?

A. Before she went she moved down in one of my cottages, one of my small places. She rented it.

Q. When was that conversation?

A. After she moved out to one of my places.

The Court: What?

A. After she left the Lake View Cottage.

(Testimony of Maude Anderson.)

The Court: That doesn't mean anything to me and I don't suppose it does to the Jury. Don't you know when she [103] left or came up? Can't you give any dates?

A. She came up there in 1940, in the spring sometime. I can't just recall. I was sick at the time and I don't just remember. I recall when she came. Her and her sister came together, but I can't just recall the time. I was sick at the time in bed. They stopped at some hotel down there in Sitka.

The Court: That isn't what you were asked. You were asked when any conversation you had occurred.

A. I never had any conversation with her about going south.

The Court: You never had any conversation?

A. No.

The Court: She was working in your house, wasn't she?

A. She was there.

The Court: You saw her every day, several times a day?

A. Yes.

The Court: You are being asked about a specific conversation.

A. I never held any conversation with her.

The Court: You weren't on speaking terms?

A. We were on speaking terms but I was in my room most of the time and not in the other part of the house, and haven't been since 1940.



(Testimony of Maude Anderson.)

The Court: Go ahead.

Q. Did you and Margie Miller have any conversation with reference to her leasing any property from you?

A. Yes. She was going to lease——

The Court: When?

Mr. Monagle: I said at any time.

The Court: We are not interested in any time.

Fix the time. [104]

A. That was in 1941.

Mr. Monagle: I was asking if she had a conversation. I was not asking what she said.

The Court: Ask her when it was. In other words, fix it sometime within a reasonable time of the time we are talking about.

Q. Mrs. Anderson, did you have a conversation with Margie Miller in Sitka, Alaska, in the Lake View Cottage sometime in the fall of 1941, with reference to your leasing her a place of business?

A. Yes.

Q. When was that conversation held?

A. That was in 1941.

Q. What time of 1941?

A. I couldn't just recall. I think it was just a while before she went out, because she was taking care of my place, and because Lulu Coleman, who is taking care of it now——

Mr. Tollefsen: If the Court please, I think it is getting unresponsive. She was not asked why.

The Court: Confine your answers to the questions asked you.

(Testimony of Maude Anderson.)

Q. You say it was sometime before or around the time she went out. What do you mean—"out"?

A. Before she went south.

Q. Before she left Sitka and went to the States?

A. Yes.

Q. That was in the fall of 1941? A. Yes.

Q. Where did this conversation between you and Margie Miller, with reference to her leasing property, take place? [105] A. In my bedroom.

Q. Who was there? A. No one.

Q. No one? A. Her and I.

Q. Margie Miller and yourself? A. Yes.

Q. Was any arrangement agreed upon between you and Margie Miller whereby you agreed—

Mr. Tollefsen: If the Court please, that question is obviously leading.

Q. I will withdraw the question. What did Margie Miller say to you at that time and place in connection with leasing any building of yours there in Sitka?

A. Well, I was to build on to it and she was to furnish it.

Q. On to what?

A. This house. It is just a two-room house. She wanted a couple more rooms. I spoke to Mr. Rands.

Q. Where is this two-room house?

A. In between the Lake View Cottage and my home.

Q. In Sitka?

A. Yes. My home is where the little cabin was;

(Testimony of Maude Anderson.)

that is where Margie lived, and after she left I built it into a home.

Q. You say that Margie told you she wanted you to build onto this little house? A. Yes.

Q. And what else did Margie say about adding onto this house or improving it?

A. She said she would furnish it, get furniture for the place. A livingroom set was already ordered, and she was going to [106] get the rest when she went south.

Q. What did she say she was going to do with the furnishings and furniture?

A. Put it in that place.

Q. The house was to be leased from you?

A. Yes.

The Court: What was the answer?

Court Reporter: "Yes."

Q. Did she tell you what she intended to lease this house for?

Mr. Tollefsen: We object. That is irrelevant.

The Court: Objection be sustained.

Mr. Monagle: Exception.

Q. What was Margie Miller's occupation at the time she was conversing with you about leasing this property from you?

A. She was running the place for me at that time, the Lake View Cottage.

Q. Did Margie Miller tell you in this conversation, in connection with leasing——

The Court: Just a minute. That is just court-trouble. The question is very apparently

(Testimony of Maude Anderson.)

leading. Let her testify as to what was said and done.

Q. Did Margie Miller tell you where she was going or what she was going to do in connection with the property she was going to lease from you?

Mr. Tollefsen: It is not material what she was going to do with the property.

The Court: There is no evidence yet that she was leasing it.

Mr. Monagle: She testified——

The Court: Who did? [107]

Mr. Monagle: Margie Miller.

The Court: This witness didn't.

Mr. Monagle: I haven't had a chance to ask her. The same questions were asked Margie Miller.

Mr. Jernberg: I object to further comment by counsel. He is trying to put the District Attorney's Office in a bad light.

The Court: What we are trying to do is elicit the truth from this witness. Let the witness herself testify, instead of putting words in her mouth.

Q. Did Margie Miller say anything to you about the use of the property which she was to lease from you? A. Yes. She said——

Q. The answer is "Yes"? A. Yes.

Q. What did she say in the conversation which took place in your house, in the Lake View Cottage at Sitka?

A. She wanted to lease the place from me and get herself some girls.

(Testimony of Maude Anderson.)

Mr. Tollefsen: I move the answer be stricken. The line of questioning is immaterial. It didn't matter what she intended to do.

The Court: I don't see any relevancy in that or any part of it.

Mr. Monagle: I would like to argue the point of the Government putting it in the evidence, and we objected when they introduced it. I would like to have the Jury excused, if the Court will hear me.

The Court: Go ahead with the examination and see where we get to. [108]

Mr. Monagle: My understanding is that the witness might answer the question?

The Court: Reframe your question.

Q. What, if anything, did Margie Miller say to you in the Lake View Cottage at Sitka during the time you testified having this conversation, what did she say in connection with the use of the property she was leasing? A. She——

Mr. Tollefsen: Objection.

The Court: The objection will be sustained. I don't care what she was going to do with it.

Mr. Tollefsen: I move the answer be stricken.

Q. You heard Margie Miller testify that you and she had a conversation in your room in the Lake View Cottage in November of 1941, at which time you and she agreed she should go to Seattle, is that true, was there such a conversation? A. Yes.

Q. She testified that during that conversation it was agreed she should go to Seattle and get some girls for you, is that true?



(Testimony of Maude Anderson.)

A. That is not true.

Q. Was it agreed whether or not she would get some girls for anyone?

Mr. Tollefsen: Well——

The Court: That is immaterial.

Q. What did Margie Miller say she was going to Seattle for?

A. Stuff to furnish up that place. Nothing was mentioned about girls. There wasn't anything mentioned about girls. I never had any talk with her about girls at no time.

Q. What did she say she was going to get?

A. A couple of bedroom sets for the bedroom, and she had already [109] ordered a livingroom set.

Q. For the property she was to lease from you?

A. Yes.

Q. Did you at any time—I will reframe that—during this conversation, is it true or not that a code was made up between you and Margie Miller, as Margie Miller testified?

A. Absolutely not.

Q. No such arrangement was made?

A. Absolutely not.

Q. Did you write to Margie Miller about bringing one or more girls or any girls?

A. Absolutely not.

Q. To Sitka from Seattle?

A. Absolutely not.

Q. Did you have any agreement about her procuring any girls and sending them to you?

A. Absolutely not.

(Testimony of Maude Anderson.)

Q. Now, during the time Margie Miller was having this conversation with you in Sitka in the fall of 1941, did you know this woman who goes by the name of Virginia Knapp, Virginia Bowman, or Jean La Rue?      A. No, I never knew her.

The Court: During what time?

Mr. Monagle: During the fall of 1941 when Margie Miller and Maude Anderson were having the conversation.

Q. Did you know Doris Mann, whom Margie Miller sent——

Mr. Tollefsen: We object.

The Court: What part do you object to?

Mr. Tollefsen: Especially to the part that she arranged transportation for this girl. [110]

Q. I will change that and substitute the name of Diana Crawford. You heard Margie Miller testify that she also arranged for Diana Crawford to come to Sitka from Seattle?

A. I heard her testify.

Q. At the time you had the conversation with Margie Miller in the fall of 1941, did you know Diana Crawford?      A. I did not.

Q. When is the first time that you ever saw Virginia Bowman or Jean La Rue?

A. I think it was December 3rd, or something like that, the 3rd or 4th. I can't recall.

Q. December 3rd of what year?      A. 1941.

Q. And where did you see her?

A. She came up to the Lake View Cottage.

Q. When did you see her? What time on December 3, 1941, was it?

(Testimony of Maude Anderson.)

A. I just don't remember what time of day it was. I was sick in my bedroom. Lulu Coleman had her come in and see me.

Q. Lulu Coleman brought her in to see you?

A. Yes.

Q. What did she say?

A. She asked me if there was a room for her, if she could get a room.

The Court: What?

A. She asked if I had a room.

Q. Was that the first time you had met her?

A. That is the first time.

Q. Had you at any time made arrangements, made any arrangements with Margie Miller with reference to bringing her to Alaska?

A. I did not. [111]

Q. Did you at any time give Margie Miller any money with which to bring this La Rue or Bowman, or any other girl from Seattle?

A. No, sir.

Q. Did you ever promise to pay Margie Miller or any one else any money to bring Virginia Bowman or Jean La Rue, or any other girls from Seattle to Sitka, Alaska?

A. I did not.

Q. When did you first meet Jackie Lugo or, as she calls herself, Elvira Cavender? When did you first meet her?

A. She came in the spring of 1941.

Q. 1941? A. Yes.

Q. And now, you heard her testify she came into a room there at Sitka in the fall of 1941, at

(Testimony of Maude Anderson.)

which time you and Margie Miller were having a conversation, at which time she stated that you were sitting there in the chair. Was her testimony true or false?      A. It was false.

Q. What was your physical condition at that time?

Mr. Tollefsen: We object to any further reference to her physical condition.

The Court: The objection will be sustained.

Mr. Monagle: Exception.

Mr. Tollefsen: I don't believe that is impeaching—

The Court: There is nothing impeaching about it. The Court hasn't admitted anything about her physical condition. The Court is not going into that.

Q. When you and Margie Miller were having this conversation at the Lake View Cottage in Sitka in the fall of 1941, it was testified to by Margie Miller—where were you in connection [112] with that room?      A. I was in my bed.

Q. And where was the bed?

A. Sitting over by the window. The room—you see, the door comes in this way, and kind of a hallway crossed, and my bed sits back there, and there is a private bath.

Q. It was as far away from the door as possible?

A. Yes. There was a hall in between.

Q. Where was Margie Miller in connection with you in that room?

(Testimony of Maude Anderson.)

A. I think she was standing by the heating stove. I just don't recall.

Q. Was she close to where you were in bed?

A. Yes.

Q. Exactly what did Margie Miller say, as near as you can remember, in the room at that time?

A. She told me she was going out and would be back and hoped the house would be ready. That was all the conversation, and nothing else.

Q. That was the entire conversation?

A. Yes.

Q. Did she say anything at that time with reference to girls?      A. No.

Q. Did she say anything at that time with reference to making up a code?      A. Absolutely no.

Mr. Jernberg: Counsel has gone over this. I think this is the third time. I think the Jury is well informed on it.

Q. You heard the testimony of Jackie Lugo or Elvira Cavender in connection with, or substantially in effect that she walked [113] into the room in the Lake View Cottage in Sitka in the fall of 1941, when you and Margie Miller were having a conversation. Do you remember her testimony with reference to making up a code?

A. I remember.

Q. Was that true or false?      A. False.

Q. Do you remember the testimony of Jackie Lugo or Elvira Cavender, in connection with that conversation in which she said that arrangements were made to bring girls up here for you?



(Testimony of Maude Anderson.)

A. I heard her say it.

Q. Was that true or false?           A. False.

Q. Did you——

The Court: Isn't this the same matter that has been gone over two or three times already?

Mr. Monagle: There are three different witnesses.

Mr. Tollefsen: I believe she can testify to the facts. She said there was no such conversation. You don't have to go over it.

Mr. Monagle: Negative proof does not overcome——

The Court: Jackie Lugo was the only person who testified that she overheard the conversation.

Mr. Monagle: And Margie Miller testified that she took part in it.

The Court: Yes, she testified that she took part in it.

Q. You heard the testimony of Jean La Rue Bowman, or whose true name is Gloria Virginia Bowman, that you made demand upon her to repay you \$70.00 for the fare from Seattle to Sitka? [114]

A. I never had any such conversation.

Q. Was her testimony true or false?

A. False.

Q. You heard the testimony of Jean La Rue, also known as Gloria Virginia Bowman, that she testified she paid this money or part of this money back to Margie Miller. Do you know whether that is true or false?           A. I do not know.

Q. Now, the Government introduced an exhibit

(Testimony of Maude Anderson.)

here, a telegram that Mr. Mansfield testified he found in your place, and I will ask you to look at it. That is Government's Exhibit Number "1".

A. I will admit the telegram come, but I never answered no telegram.

Q. You admit you got the telegram?

A. Yes.

Q. The telegram came to you? A. Yes.

Q. And you say you didn't answer it?

A. I didn't know what she was meaning.

Q. She testified on the stand that that meant that when she said dresses she meant girls—two dresses and a coat, meant girls.

A. I don't know anything about it.

Q. Was any such arrangement made between she and you? A. No.

Q. Do you know anything about what the telegram says about "need the three badly"?

A. I don't know what she meant.

Q. When Margie Miller left Sitka, how much of her property, personal effects, did she take with her?

A. I don't know, for I was sick in bed at the time. [115]

Q. Where was Margie Miller living prior to the time she left Sitka in November, 1941?

A. She was living in one of my little cottages.

Q. And did she give up that cottage when she left Sitka?

A. No, she left her stuff there. I don't know what she left, for I wasn't down there.

Q. You don't know?

(Testimony of Maude Anderson.)

A. No. She told me she had a livingroom set coming, and if it come to have it put in there until the other place was ready.

Q. Did you?

A. I didn't bother about it. It was on the dock when she come back. She moved it herself.

Q. Does she have any personal effects in your house?      A. No.

Q. She moved out of there entirely?

A. Yes.

The Court: When did she move out of your house?

A. About two weeks before she left, something like that. I don't remember just how long it was.

Q. Two weeks before?

The Court: I understood you to say she was running your place for you?

A. Yes, but she had the other house there.

The Court: She was not staying there?

A. No. She was sleeping down at the other place.

The Court: Who was taking care of the place when she wasn't there?

A. Lulu Coleman, the same lady has been there since the spring of 1940.

The Court: How did she take care of your place when she [116] was sleeping at the other place?

A. She always stayed up there.

The Court: Most of your business is night business, isn't it?

(Testimony of Maude Anderson.)

A. Yes, but she always stayed there until morning.

Q. The Judge asked you——

A. She had a room in both places—a room in the Lake View Cottage—and the place for her furniture and stuff she was putting in this place—there was only one room and a kitchenette.

Q. The Judge asked if most of your business wasn't night business. Was she there during the time of business?

A. No, at the Lake View Cottage.

Q. And in the day time?

A. At the other place. She didn't stay, but was in and out.

Q. What rent was Margie Miller paying you for the use of this little house?

A. \$25.00 a month.

Q. You heard Margie Miller testify that you gave her credit for that rent to reimburse her for the transportation of this Virginia Bowman, Gloria Virginia Bowman, known as Jean La Rue, and also the other two girls she arranged for in Seattle to transport by plane to Alaska. What arrangements, if any, were made between you and Margie Miller in connection with that rent?

A. That is not so. I didn't.

Q. What is the truth about the rent for the place she was living in?

A. She had the rent paid until she came back. She was mad at me because she didn't get the place next door and she stayed, and when I wanted to build a home, she stayed there until she [117] dis-

(Testimony of Maude Anderson.)

posed of the livingroom set and other things. I sent Mr. Rands to ask when I could have the place for my mother and myself. I have had a nervous breakdown.

Mr. Tollefsen: I believe the question has been answered.

Q. Did Margie Miller pay and, if so, when did she pay for the rent of that cottage?

A. She paid the rent before she went out. She was paid up, but she had me all paid up when she went out. When she came back, she refused to pay because she didn't get the place, and she refused until she could sell the livingroom set and go south. Her sister was with her at that time and both of them lived down there.

Q. Has she ever paid you that rent?

A. No, sir.

Q. Did you ever give her credit on that rent?

A. Absolutely no.

Q. For anything?                   A. No.

Q. When Margie Miller testified she was allowed credit for that rent against the expenses of sending the girls from Seattle to Sitka, is that true or not?

A. That is not true.

Q. When you first met Jean La Rue, Gloria Virginia Bowman, I think you testified that Lulu Coleman brought her into your bedroom?

A. Yes.

Q. You testified that you hadn't met her before that occasion, is that your testimony?

A. That is right.



(Testimony of Maude Anderson.)

Q. Do you know where she was from?

A. I did not.

Q. How did you find out where she was from?

A. I never asked her.

Q. Did you know where she was from?

A. No, I didn't.

Q. You heard Margie Miller's testimony, when she testified having a conversation in your room at the Lake View Cottage in Sitka in the fall of 1941, and she testified that you told her that if the girls that she obtained didn't have fare that she should advance it and you would collect the money from the girls when they got to Sitka. Is that true?

A. No, sir.

Q. Did you collect any money?

A. No, sir.

Q. From any of the girls? A. No, sir.

Q. From Jean La Rue? A. No, sir.

Q. Did you pay Margie Miller all her costs of her own personal transportation to go to Seattle or back? A. No, sir.

Q. Did you pay Margie Miller for her time or for her getting the girls? A. No, sir.

Q. Not at that time or any time since?

A. No.

Q. Did she ever make demands on—what, if any, demands did Margie Miller make on you to pay her own personal transportation for going to Seattle and getting the girls for you?

A. None. [119]

Q. Has she up to the present day?

(Testimony of Maude Anderson.)

A. No.

Q. You heard the testimony of Margie Miller on the stand when she testified that she arranged for three girls to come from Seattle to you in Sitka. One was this Virginia Bowman or Jean La Rue, and another one she identified as Diana Crawford, and another she said she didn't know the name of. You heard her testify to that? A. Yes, I did.

Q. Did Diana Crawford come to work for you, by plane or boat?

A. She never come. I never seen her until she was over there at the Red House.

Q. Did she work for you?

A. She was there later on.

Q. When did she work for you?

A. I think it was—I just don't remember. She was over in the Red House. She wasn't over at my place very long. She came from Mary's over there. I don't recall.

Q. Can you inform the Court and Jury approximately when it was, within a reasonably certain time? A. It was the latter part of 1942.

Q. Of 1942?

A. Or the first part of 1943. I just don't remember. I was sick at the time. I wasn't even there when she came.

Q. Did Diana Crawford, to your knowledge, work in your place at any time in the year 1941 or the year 1942? A. No, not in 1941.

The Court: You said she did work for you in 1942?

(Testimony of Maude Anderson.)

A. I said the latter part of 1942 or first of 1943. I just don't remember. I wasn't there. I was living in my own private [120] home. I was sick. I wasn't even over to the place.

The Court: Where is your own private home?

A. The second, the third house is my home. There is the Lake View Cottage and the little place I was telling you about, and my home is next. I built my home out of the place Margie lived in.

The Court: Right next door to the Lake View Cottage?

A. The second door.

The Court: How far away?

A. Those lots are fifty feet wide and there is a house on each lot, and there are three in a row.

The Court: It could be 100 feet?

A. 150 feet.

The Court: It couldn't very well be 150 feet with a house on each lot.

A. That is right.

The Court: It couldn't have been over 100 feet?

A. I never measured it.

The Court: Is there anything else?

Mr. Monagle: We want to make an offer of some evidence which the Government will probably object to. In order to have the record straight I would like to make the offer in the absence of the Jury, but before we are through with the witness.

(Whereupon the Jury was duly admonished and excused until April 6, 1945, at 10:00 o'clock A.M.)

The Court: You may proceed.

Mr. Robertson: We offer to prove by this witness in this conversation—we offer to prove by the defendant that [121] this conversation with the witness Margie Miller in the fall of 1941, shortly before Margie Miller left Sitka to go to Seattle, that she, Margie Miller, made an arrangement with the defendant by which defendant agreed that she would have Clarence Rands build or add to a building for Margie Miller, and that Margie Miller decided at that time and told the defendant she wanted that building for a house of prostitution, and was going to Seattle to get girls for that house of prostitution.

Mr. Tollefsen: The witness already testified she at no time discussed getting girls for anyone. This is in direct conflict.

The Court: That was not only her testimony, but the substance of Mr. Rands'.

Mr. Monagle: The Court refused to let me ask that question and said it was immaterial. The record will show that the Court said it made no difference what she was going to use it for.

Mr. Robertson: It seems to me that is perfectly fair, competent evidence, if it could be proved, because it goes right to the very theory of the defense, that this woman Margie Miller, who has already plead guilty to this charge—it shows her motive for going to Seattle, her motive for talking with a fellow and getting this young girl, her motive as to the two other women, going in the Pan American Office and getting transportation, or

some place; it shows the motive of that witness Margie Miller and certainly, if that was her purpose, it also bears out the theory of defendant's defense in this case, that she never had an agreement with Margie Miller to procure [22] girls to send to her. I believe it is perfectly competent evidence.

The Court: There is no such evidence. The witness said she never had any such conversation with her about girls.

Mr. Monagle: With reference—for Maude Anderson.

Mr. Robertson: Our contention is, your Honor, that the defendant did not make any such answer as your Honor contends. She was asked if she had any conversation with Margie Miller about Margie Miller procuring girls for this defendant, and the defendant said she never made such arrangements and didn't have any such conversation, and that Margie Miller told Mrs. Anderson she was going to get girls for her, Margie Miller's, house that Clarence Rands was going to build.

The Court: My recollection is that she was asked if she had any conversation with Margie Miller about bringing up girls for her, and she said, no, she never had any conversation with Margie Miller about any girls, or that was the substance of it.

Mr. Monagle: I submit we tried to prove the same thing by Mr. Rands and was ruled out.

The Court: I don't agree with that either.

Mr. Monagle: Mr. Rands wasn't permitted to answer the question. I submit to the Court that



when we discussed the matter—the Jury wasn't present——

The Court: You were asking him if he had a talk with the witness Margie Miller about building a place for her, and he said he didn't.

Mr. Robertson: It was about Mrs. Anderson building a place. [123]

The Court: I understand what you are talking about now, but there was no question of that kind asked Rands, or it escaped me.

Mr. Robertson: We make an offer—the defense can put up, and show by this woman that this other woman perpetrated the crime and this woman had no motive. It seems to me competent evidence.

Mr. Tollefsen: This offer of proof is directly contradictory of their own witness, impeaching, which is not allowed.

Mr. Monagle: Our witness testified there was no conversation about bringing women for her. That was her testimony.

Mr. Jernberg: If the Court please, I am sure she testified that she had no conversation about any girls, any time, any place, and never discussed girls at all. My notes show that, and I think Miss Maynard——

The Court: That is my recollection. She was asked about bringing girls up for her, and she said she never had any conversation at any time and never talked to her about girls.

Mr. Robertson: I am unable to agree with that testimony. At the time I didn't understand it so, but if that is what the Court's view is, I will leave

it off the offer of proof that Margie Miller told this defendant she wanted to go to Seattle to bring these girls up. My offer of proof will include that she wanted Mrs. Anderson to build this house and make arrangement with Clarence Rands to build it or add to it for Margie Miller for the use of prostitution. [124]

The Court: Mr. Rands didn't testify to anything like that. What good is an offer of proof if it is not submitted to the Jury?

Mr. Robertson: Every time Mr. Monagle asked these questions, he was ruled out. I offer it in good faith. I want to protect our record because I think the Court is in error in ruling that way.

The Court: You can make your offer of course. That is your right.

Mr. Robertson: I made my offer. I think Miss Maynard has got it but I will restate it. The defendant offers to prove by herself that in this conversation between herself and Margie Miller in the fall of 1941, shortly before Thanksgiving and shortly before the time that Margie Miller left Sitka and went to Seattle, and in her bedroom in this house that she was then living in in Sitka, she and Margie Miller being present, that arrangements were made by which this defendant agreed she would have Clarence Rands build a house for this Margie Miller, and this Margie Miller then and there told defendant that she wanted the house for the purpose of having a house of prostitution of her own, and we offer to make proof by this witness.

The Court: (To Court Reporter) Transcribe the offer and transcribe Clarence Rands' testimony before tomorrow morning.

Mr. Monagle: Will that include my statement with reference to the conversation with the District Attorneys before the Court so the Jury couldn't hear the conversation? [125]

The Court: Where?

Mr. Monagle: In the transcript, for review of it, as to what was offered.

The Court: I told her to transcribe Clarence Rands' testimony, including everything that went with it. Frankly, I am a little confused myself. The witness testified she had no such conversation, and she said later that she did talk with her about leasing a house from her. I don't know what she meant. At any rate (to Court Reporter) let me have that record the first thing in the morning.

(Whereupon Court recessed until 10:00 o'clock A. M. the following day, April 6, 1945, reconvening as per recess, with all parties present as heretofore and the Jury in the box; whereupon the following took place:)

(Previous to the convening of Court the transcripts above referred to were furnished to the Court.)

The Court: You may proceed.

Mr. Robertson: The Court has not taken a ruling on our offer at this time?

The Court: Yes, you may call her.

(Testimony of Maude Anderson.)

(Whereupon the defendant Maude Anderson resumed the stand.)

Q. (By Mr. Monagle): Mrs. Anderson, just before court adjourned yesterday you were asked a question as to what, if any, conversation you and Margie Miller had at the Lake View Cottage in the fall of 1941, in connection with her renting some property from you. Did you have such a conversation with her at that time and place, at the Lake View Cottage in Sitka in [126] the fall of 1941? A. That is right.

Q. Now, what was that conversation?

Mr. Tollefsen: If the Court please, I don't believe it is definitely fixed. It is pretty indefinite as to time.

The Court: Fix the time.

Q. When and where did this conversation take place? A. In my private bedroom.

Q. Where were you? A. I was in bed.

Q. When was it?

A. In 1941, in November sometime, but I can't just place the date.

Q. In November, 1941? A. Right.

Q. In your bedroom? A. Yes.

Q. Who was there?

A. Margie Miller and I.

Q. Just the two of you? A. Yes.

Q. What conversation took place between you?

A. I was to build on this place and lease it to her, and she was to run it as a place of her own.

(Testimony of Maude Anderson.)

Q. You say you were to rent her this place?

A. The place next door to the Lake View Cottage.

Q. What do you mean—a business of her own—did she state—

A. Yes, for prostitution.

Q. Did she state that she was going to set up a house of prostitution?

Mr. Tollefsen: I object to counsel going over the answers. [127]

The Court: Let the witness testify.

Q. What business did she state she was going to—

Mr. Tollefsen: I object to the repetition.

The Court: Yes.

Q. Was there any other conversation at that time and place between you and Margie Miller on that same subject?

A. Well, she told me it won't be any trouble for her to get her own girls.

The Court: That isn't responsive to the question.

Q. Answer "Yes" or "No".

A. Yes.

Q. What was this conversation between you and Margie Miller at that time and place?

A. That was—she said she was going to furnish it herself and get her own girls. She was to furnish the place herself.

Mr. Jernberg: And to get—

A. Her own girls, yes.

Q. Was there any conversation between you and



(Testimony of Maude Anderson.)

her as to what compensation, if any, she was to pay you for the place?      A. Yes.

Q. What was that agreement between you and her?

A. I was charging \$50.00 a month for it.

Q. For what?

A. For the lease of the place.

Q. For the lease of the place?      A. Yes.

Q. What were you furnishing for—what was the agreement—state what the agreement was between you and her?

A. The house—I was to build on the extra room she wanted and leave all the furniture in there. It was only a two-room [128] house at that time.

The Court: You were going to build how many additional rooms?      A. Three extra bedrooms.

The Court: Three extra bedrooms?

A. Yes.

Q. Was there any agreement between you and Margie Miller as to who should furnish the furniture for this place in addition to what you said you were going to leave there?

A. She was going to buy the furniture herself.

Q. Now, in accordance with that agreement entered into between you and Margie Miller—

The Court: Is this an agreement or just a conversation?

Q. Was this an agreeemnt or just a conversation?      A. This was an agreement.

Q. In accordance with that agreement did you

(Testimony of Maude Anderson.)

do anything or consult with anyone in performing your part of the agreement?

A. No, I did not, only the contractor. He was to build——

Q. What contractor did you consult?

A. Mr. Rands.

The Court: I understood her to say she didn't consult anyone.

Mr. Monagle: Except the contractor.

Mr. Tollefsen: I object to counsel trying to rephrase the answer.

The Court: I will let him ask the question.

Q. Did you, in accordance with the contract or agreement between you and Margie Miller, have the three bedrooms constructed?

A. No, I didn't, because the war broke out.

Q. Now, you heard Margie Miller testify yesterday that you had [129] written her a letter, or that she had received a letter from you when she was in Los Angeles, sometime in the fall of 1941, I believe she said around the first of December or thereabouts, in which you said in substance that the girls hadn't arrived in Sitka. Did you write Margie Miller any such letter?

A. No, I didn't, for I didn't know any address of Margie's.

Q. Did you write any letter whatever to Margie Miller after she left Sitka somewhere around Thanksgiving of 1941, between that date and say January 1, 1942? Strike that question. Did you write Margie Miller a letter at any time after she

(Testimony of Maude Anderson.)

left Sitka in the fall of 1941 and until she returned in the spring of 1942?

A. No, I did not.

Q. Did you send Margie Miller any telegrams during the period after she left Sitka in the fall of 1941 and until she returned to Sitka in 1942?

A. No.

Q. You heard a telegram read, which is Government's Exhibit Number "1". It was introduced in court yesterday and read to the Jury. Did you answer that telegram?

A. No, I did not.

Q. Did you write to Margie Miller or anyone else in reference to that telegram?

A. No, I did not.

Q. Did you do anything or take any action whatever in connection with that telegram?

A. Absolutely not.

Q. You heard F. B. I. Agent Oliver Mansfield testify in court yesterday that he talked with you when you were arrested in Sitka on August 31, 1944. Where did he talk to you? [130]

A. I was sick in my bed from a fever shot.

Mr. Tollefsen: That is not responsive.

Q. Where were you?

A. I was in my private home.

The Court: Read the previous question.

Court Reporter: "Where did he talk to you?"

The Court: Who do you mean—"he" talked?

Mr. Monagle: Oliver Mansfield, the F. B. I. Agent, when she was arrested.

Q. Now Mrs. Anderson, at that time and place

(Testimony of Maude Anderson.)

when F. B. I. Agent Oliver Mansfield was in your home when you were arrested on this charge, who else was in the house besides Mr. Mansfield?

A. You mean the officers?

Q. Everyone that was in the house.

A. Mr. Whitmore, Mr. Anderson, my mother and the lady that worked for me, taking care of me and my little niece.

Q. You mean this girl that is in the courtroom?

A. No, that is my older niece. The one twelve years old who has gone to Seattle.

Q. That's all the people? A. Yes.

Q. Mr. Mansfield testified he found the telegram in a Valentine box in a drawer in one of the rooms of the house. Where did he find that, if you know?

A. He said he found it in my mother's room.

Q. Were you with him?

A. Absolutely not. I couldn't get out of bed.

Q. Was it in the room where you were?

A. No, sir.

Q. Did he take you to the room where they found the telegram? [131] A. No, sir.

Q. Whose room was it where the telegram was found? A. My mother's room.

Q. Judge Alexander asked you yesterday where your home was located in connection with the Lake View Cottage, which the girls testified was a house of prostitution and where they carried on a business as such. Is your home, or place where you have been living, and the place where the telegram

(Testimony of Maude Anderson.)

was found, ever been used as a place of prostitution?

A. Absolutely not.

Q. What was it used for exclusively?

A. For my home and a home for my mother.

Q. Now Mrs. Anderson, yesterday afternoon you were in court and heard Margie Miller testify to the effect that during the fall of 1941 she had operated the Lake View Cottage in Sitka. Is that true or not?

A. That is true.

Q. You heard Jackie Lugo on the stand yesterday afternoon asked the question whether or not Margie Miller had managed the operation of the Lake View Cottage, and her answer was "No." Is that true or not?

A. That is not true.

Q. When Margie Miller testified that she—or, put it this way—Do you know what Margie Miller did when she operated the Lake View Cottage?

A. She took care of everything.

Mr. Tollefsen: Just a minute. "Yes" or "No".

A. Yes.

Q. What was her occupation and duties in connection with the operation of the Lake View Cottage? [132]

A. She took care of everything and managed it.

The Court: What?

A. She took care of it and managed it.

Q. In connection with the operation of this Lake View Cottage in Sitka in the fall of 1941, during the period that Margie Miller was operating or managing it, who had charge of the handling of the cash?

A. Margie.



(Testimony of Maude Anderson.)

Mr. Tollefsen: I object on the grounds that it is incompetent, irrelevant and immaterial.

Mr. Monagle: It is highly material.

The Court: I don't think it has anything to do with this. We are not going into an accounting in the case.

Mr. Monagle: A government witness testified she was in the room getting cash from a certain person. We have a right to prove if it was true or not.

The Court: What has that to do with the case?

Mr. Monagle: Jackie Lugo testified she was getting change from Maude Anderson and heard a conversation wherein they made up a code.

The Court: We are not going into it anyway.

Mr. Monagle: May it please the Court, we want an exception.

Q. Mrs. Anderson, you heard Margie Miller testify that she managed the operation of the Lake View Cottage in the fall of 1941. When did she discontinue the operation or management of the Lake View Cottage?

A. I am not just sure, but I think it was around just before Thanksgiving.

Q. What is your answer to that question with reference to the [133] time Margie Miller left Sitka in 1941? A. That was in November.

Q. How long a period, or was she still managing the Lake View Cottage with reference to the time she left?

A. Up until about a week before she left.

(Testimony of Maude Anderson.)

Q. Do you know where she was during that week? A. She——

Q. Answer “Yes” or “No”. A. Yes.

Q. Where was she?

A. Down in the cottage getting herself ready to go.

Q. What cottage? A. In my cottage.

Q. Down in your cottage? A. Yes.

Q. What do you mean by saying, “Down in my cottage”? A. The one she rented from me.

Q. And during the period she was living in this cottage that she rented from you, was she working as a prostitute? A. That is right.

Q. She was? A. Yes.

Q. How much was Margie Miller paying you for the cottage that she was living in during that period? A. \$25.00 a month.

Q. And how long did Margie Miller live in that cottage?

A. She rented that cottage in October.

Q. Of what year? A. 1941.

Q. And how long did she keep it? [134]

A. She kept it until after she came back and sold her stuff.

Q. You say—— A. That was in January.

Q. Of what year? A. 1942.

Q. Did she pay you the rent for the use of that cottage?

A. She paid me the rent up until she went out, but after she came back she didn't.

Q. What months were the rent for?

(Testimony of Maude Anderson.)

A. November.

Q. Did she pay you for October?

A. Yes, she paid October.

Q. Did she pay for December? A. No.

Q. Did she pay for January? A. No.

Q. You say she didn't pay you for the month of December, or January. Did she live in that house that you had rented to her, after she returned from the States?

A. Right. Her and her sister both.

Q. For how long a period?

A. I think it was January and up until she left. I don't just remember.

Q. Until she left for where?

A. The south.

Q. Until she left Sitka to go to the States?

A. Yes.

Q. When did Margie Miller come back to Sitka from the States, after her trip when she testified she went south in November, 1941? [135]

A. I think it was in January. It was after the holidays, in January or the last of December. It was the first of January when she got back.

Q. What year? A. 1942, I guess.

Q. How long did she stay in Sitka when she came back from the States?

A. I just couldn't tell you how long she stayed when she came back from the south.

\ Whereupon after receiving permission from the Court, Mr. Robertson and Mr. Monagle, attorneys for defendant, conferred together;

(Testimony of Maude Anderson.)

thereafter respective attorneys and Court Reporter approached the Bench, out of hearing of the Jury.)

Mr. Monagle: May it please the Court, for the record, we offer to adduce evidence by the witness on the stand and by other witnesses as to the physical and mental condition of the defendant at the time the alleged crime was committed and at the time Jackie Lugo Cavender claims she went in the room to get change when Margie Miller was there and she heard some conversation about a code with reference to bringing girls up here.

The Court: Do you claim she was incompetent?

Mr. Monagle: No, not mentally, but that she was taking shots, and I might submit to the Court the reason why we want to adduce the evidence. Margie Miller testified that Maude Anderson was in bed when she talked to her about the code. Jackie Lugo Cavender testified that Maude was not in bed but was sitting up. Also we offer to submit proof by this witness on the stand and others that during the time that Margie Miller testified, or [136] during the time that Jackie Lugo testified she went in to get change from Maude Anderson that Margie Miller herself was personally managing the house of prostitution, handling all the cash, and making all of the change, and that Jackie Lugo's testimony is false when she testified she went into that room to get change from Maude Anderson and that she got change from Maude Anderson.

(Testimony of Maude Anderson.)

The Court: If she says that is the truth, she can testify to it. I don't recall any such testimony as that.

Mr. Monagle: Jackie Lugo testified to it on the stand, that that is why she went in the room and was only in there two minutes, and she went in to get change.

Mr. Robertson: From Mrs. Anderson, and was in there two minutes and heard——

The Court: She said they were talking——

Mr. Monagle: She was asked and she answered, "I went in there——"

The Court: And that they were both in there——

Mr. Monagle: I mean to prove by these witnesses that is purely a fictitious story, unless there is some other reason. Her reason was to get change.

The Court: What do you mean? That she didn't go in to get change?

Mr. Monagle: And that she was not even in there. The defendant testified she never had any conversation when Jackie Lugo was present.

The Court: You asked her about that already.

Mr. Monagle: All right, but it certainly impeaches Jackie Lugo's testimony.

The Court: We are not going into it any further. [137]

Mr. Robertson: I don't know how far we can go about stating her general condition. For the record, we will state what we are going to show her physical condition is.



(Testimony of Maude Anderson.)

Mr. Monagle: May it please the Court, we can show by this witness and by competent other witnesses, and we can tender proof that Maude Anderson suffered a nervous breakdown shortly prior to this, within a few months, and was in a very poor mental condition, that she was suffering from arthritis, heart trouble and asthma, during the time, and was under the doctor's care and is still under the doctor's care for these ailments, and that she was in great pain and under the influence of medicine.

The Court: In other words, she didn't know what she was doing at any time?

Mr. Monagle: No, that is not the inference.

The Court: It certainly would be the inference.

Mr. Monagle: I don't mean——

The Court: That in a condition like that, she didn't know and does not now——?

Mr. Monagle: A person in great pain is—like when they came in to arrest her and the F. B. I. agent had her sign papers. She was in no condition—if the doctor had been there he would not have permitted them to talk to her—to arrest her and that was all. I can prove it by the doctor.

The Court: That would just open an avenue of investigation—we would never get through with this.

Mr. Monagle: It is important to the defendant, may it please the Court. [138]

The Court: I can't anticipate these things.

Mr. Monagle: I realize that.

(Testimony of Maude Anderson.)

The Court: I am not passing in advance until I know what they are going to develop.

Mr. Robertson: We understood the Court consistently ruled that we can't show anything about illness. That is why we make the offer of proof. Mike (Mr. Monagle) asked her several times and invariably the Court ruled it out. We make the offer of proof to protect our record.

The Court: I don't think that has anything to do with it, unless she was incompetent and didn't know what was going on.

Mr. Robertson: That is why we make the offer of proof. The Court ruled it out.

Mr. Jernberg: What is the offer of proof for? When Mr. Mansfield was there?

Mr. Monagle: Definitely and when Margie Miller was there.

The Court: Are you claiming it was an illegal search?

Mr. Robertson: Yes.

The Court: As to her physical condition—she talked to the contractor about building her house and she was certainly able to look after any other matters. She even had him make plans.

Mr. Monagle: Well, I could go into that.

The Court: It was right at the time we are talking about.

Mr. Monagle: I could go into that more fully, but the Court wouldn't let me.

The Court: You have gone into it more fully already.

(Testimony of Maude Anderson.)

Mr. Robertson: We take exception to the Court's ruling.

(Respective attorneys and Court Reporter left the Bench and were again within hearing of the Jury.) [139]

Mr. Monagle: You may cross examine.

### Cross Examination

By Mr. Jernberg:

Q. Mrs. Anderson, yesterday you testified that you have lived in Alaska since 1926?

A. I said that is when I came up here. I went out in 1927.

Q. When did you return?

A. I came back in 1928.

Q. And you have lived here since 1928?

A. Yes.

Q. What business have you engaged in since 1928?

A. I was married in 1929 in Petersburg, Alaska. It was the latter part of 1928 when I came back.

Q. You have been a housewife since 1929?

A. Yes.

Q. Isn't it true that you built and operated the Lake View Cottage, a well-known bawdy house in Sitka?

A. That was in March in 1938.

Q. You built that house in 1938 and have operated it ever since, is that correct? Do you understand my question?

A. No.

(Testimony of Maude Anderson.)

Q. Isn't it true that you operated the Lake View Cottage as a house of prostitution since 1938?

A. Well, I got it in 1938, March 1938.

Q. Isn't it true that you operated it as a house of prostitution since 1938?

A. Not all that time, no.

The Court: Answer the question "Yes" or "No". [140]

Q. You can answer "Yes" or "No" and explain your answer.

A. I wouldn't know hardly how to answer that.

The Court: Answer it.

A. You see, after 1940 I haven't been able to be over there. I have been sick since then. I went out in 1940 on a stretcher.

Mr. Tollefsen: I ask that the answer be stricken as not responsive.

The Court: Motion granted.

Q. Do I understand your answer to be that you operated it from 1938 to 1940? A. Yes.

Q. You testified that Margie Miller ran the Lake View Cottage and that she took care of everything and managed it, is that correct?

A. That is right.

Q. Do you mean by that she got all of the revenue?

A. Absolutely not. I didn't say that.

Q. I am asking, did she get all of the revenue?

A. No.

Q. What share did you get? A. Half.

Q. Half of what? A. What was taken in.

(Testimony of Maude Anderson.)

Q. What were the sources of revenue?

Mr. Monagle: I object on the grounds that it is incompetent, irrelevant and immaterial, as to what Margie Miller got.

The Court: He was not asking what Margie Miller got.

The question was what was the revenue from.

Q. From prostitution? Gambling? Liquor? Phonograph? [141]

A. I had a phonograph there, yes.

Q. You testified here today that Margie Miller rented a cottage from you and paid \$25.00 a month, is that correct? A. That is right.

Q. Did you mean that she practiced prostitution in that cottage?

A. I don't know what she did in that cottage.

Q. As a matter of fact she practiced prostitution in your house?

A. At the time that she rented the cottage, she was running my place.

The Court: She was running your place for you? A. That is right.

Q. You testified this morning that you were living in your own home and Mr. Mansfield and Mr. Whitmore and the officers came to your house?

A. That is right.

Q. Were you living in your own home in November, 1941? Was that house built then?

A. No, sir.

Q. You were living in the Lake View Cottage, weren't you? A. Yes.

Q. And where were you living, Mrs. Anderson,



(Testimony of Maude Anderson.)

when this telegram, Government's Exhibit Number "1," came to you?

A. The Lake View Cottage.

Q. You heard the testimony of Gloria Bowman, Mrs. Cavender and Margie Miller, did you not?

A. I did.

Q. Did you hear them testify that out of each \$3.00 they earned as prostitutes, or each \$5.00, you got one out of three and two out of five?

Mr. Monagle: One girl said she paid half. Gloria [142] Bowman said she paid half. Another girl said she paid one out of three, and two out of five, and four out of ten. I submit to the record. She can't answer that.

The Court: The Jury knows what the testimony is in that regard. We are not going into that further.

Q. Mrs. Anderson, were you receiving that money in November of 1941? Were you receiving money from the prostitutes in November, 1941?

A. I told you I was—Margie was running the place and I was getting half of whatever she took in.

The Court: Read the answer.

Court Reporter: "I told you I was—Margie was running the place and I was getting half of whatever she took in."

Q. You testified that Margie Miller stopped running your house a week before she left for Seattle?

A. That is right.

Q. Who got the money from the prostitutes during that week and subsequent weeks?

(Testimony of Maude Anderson.)

A. Mrs. Lulu Coleman was running the place, and she is running it now, and she had taken the place over at that time.

The Court: For you?

A. Yes. She had taken it over.

The Court: For you?

A. And for herself just as well. I get half. She gives me half.

The Court: She is operating it for you?

A. For half of what is taken in.

The Court: You still own the house?

A. That is right.

The Court: And you owned the business. Go ahead.

Q. During the period I covered, the last week Margie Miller was [143] there and the following month, is it your testimony now that Lulu Coleman received half of all the revenue?

A. That is right.

Q. How many girls did you employ in November of 1941?

A. I couldn't tell you who was there and who wasn't. I was too sick. I don't remember.

Mr. Tollefsen: I request that the part of her testimony about being sick be stricken as not responsive.

Q. You kept the books, didn't you, Mrs. Anderson? A. I did not.

Q. Well, how many can you remember were there? Give us your best recollection as to the number of prostitutes you employed in your house.

(Testimony of Maude Anderson.)

A. Sometime there was two—three.

Q. I am talking about November, 1941.

A. There was four there, I think, as near as I can remember.

Q. There were four?           A. Yes.

Q. Would you mind giving me their names?

Mr. Monagle: I object on the grounds that it is incompetent, irrelevant and immaterial. It doesn't prove anything.

Mr. Jernberg: If the Court please, I will try to tie it up with some later testimony.

Mr. Monagle: We object. This is Cross Examination. If he has any other testimony, it should be put on in Direct.

The Court: That is all true, but the Direct Examination has certainly taken a wide field. You may ask her.

Mr. Monagle: We take an exception. [144]

Q. Will you name them, Mrs. Anderson?

A. Violet Roland, Lou Dixon.

The Court: How do you spell the last name?

A. D-i-x-o-n, I guess. Margie Miller, Jackie Lugo.

Q. Now, did you hear Gloria Bowman, or Jean La Rue as you knew her, testify yesterday that when she moved into your house that she was given a new room? Did you hear her testify to that?

A. I did.

Q. Was that correct?

A. I don't know if you would call it new.

Q. Mr. Rands constructed it?

(Testimony of Maude Anderson.)

A. Since 1939—it was only a two-room house when I bought it. You can see that it is built on all around. There are six bedrooms on it, and a kitchen, pantry and bathroom.

Q. The room that Gloria Bowman occupied, Mrs. Anderson—do you recall when that was built on there?

A. Yes. I was having some building done before War broke out. I don't just remember what time.

Q. Isn't it true, Mrs. Anderson, that you knew Gloria Bowman was coming to your house and that is why the new room was built?

A. Absolutely not. I was building on every year, as I could.

Q. And had you expanded your business every year?

A. No, but I was building on the place.

Q. Can you tell me, or do you know when the soldiers were paid in Sitka in 1941?

A. I don't remember.

Q. Do you remember them as having been paid on the first of each month?

A. I guess that is when they do get paid. I don't just remember. [145]

Q. Did you tell Margie Miller during the time you made the arrangement or had the conversation with her in November to have some of the girls fly up in order to be there for the Army pay day?

A. I did not.

Q. Isn't it true, Mrs. Anderson, the reference

(Testimony of Maude Anderson.)

in the telegram to air mail referred to sending prostitutes up by air plane? Isn't that true?

A. No. I don't remember what that meant.

Q. You don't remember what that meant?

A. I don't know what that telegram meant. I didn't pay any attention to it. I don't know what she meant by that telegram. That is why I didn't bother about it.

Q. When Margie Miller left Sitka in November, 1941, you were on friendly terms with her, were you not?

A. What?

Q. When Margie Miller left Sitka in November, 1941, you were on friendly terms?

A. The first time or the last?

Q. November of 1941?

A. Yes. We had no arguments.

Q. You were friendly, were you not?

A. Yes.

Q. She worked for you?

A. Yes.

Q. When you received this telegram from Margie Miller, what did you do?

A. I didn't do anything.

Q. What did you think it meant?

A. I didn't know what it meant. I didn't know what she meant [146] by it.

Q. Have you heard this telegram, Mrs. Anderson? You had it in your possession. Did you hear it read yesterday?

A. Yes, I heard it read.

Q. You say now, you don't know what she meant when she said in the telegram, "Air mail two dresses today?"



(Testimony of Maude Anderson.)

Mr. Monagle: Technically he left out some words.

Q. "Air mail two dresses today send coat on North Coast need the three badly," signed "Marg." What did you think that meant?

A. I wouldn't know what it meant. She wasn't sending me anything. I didn't order anything.

Q. What did she mean, if you know, when she said, "Send coat on North Coast?" What did you do as a result of that phrase?

A. I didn't do anything.

Q. You were friendly with her, weren't you?

A. Yes.

Q. You testified yesterday, Mrs. Anderson, that the first time you saw Jean La Rue was at the Lake View Cottage on December 3, 1941. Is that correct? Do you recall your testimony?

A. Who is that?

Q. Yesterday, Mrs. Anderson, you testified that the first time you saw Gloria Bowman was at the Lake View Cottage on December 3, 1941?

A. Yes. I think it was the third. As near as I could remember, it was on the third.

Q. How do you recall the date as being on the third?

A. It was about seven days before War broke out. War broke out on the seventh.

Q. Do you recall the North Coast as having come in on that day?

A. I don't just remember.

Q. You received this telegram on the 29th of November, isn't that correct?

(Testimony of Maude Anderson.)

A. I wouldn't know when.

The Court: If it is anything about the telegram, look at it.

A. (Looked at telegram): I don't remember when it came.

The Court: Did you make any reply to it?

A. No, sir.

The Court: Why didn't you, if you say you didn't understand what it was about?

Mr. Robertson: We take exception to that question by the Court as incompetent, irrelevant and immaterial. A person doesn't have to answer a telegram.

The Court: That is a question for the Jury to decide.

Mr. Robertson: We take exception to your Honor's question.

The Court: What is the answer?

Q. You haven't answered the question, Mrs. Anderson.

The Court: Read the question.

Court Reporter: "Why didn't you, if you say you didn't understand what it was about?"

A. The reason I didn't was it didn't concern me. I didn't know what she meant by it.

The Court: What was the answer?

Court Reporter: "The reason I didn't was it didn't concern me. I didn't know what she meant by it."

Q. You mean you want the Jury to believe the telegram was from a good friend and employee of yours and you didn't do anything about it?

(Testimony of Maude Anderson.)

A. I didn't know what she meant. I wouldn't answer something I [148] didn't know anything about.

Q. Getting back to the day Gloria Bowman arrived, I believe your testimony yesterday was that she was brought to you by some other employee of your house, isn't that correct? Isn't that your testimony of yesterday? A. Yes.

Q. What conversation, if any, did you have with Gloria Bowman when she was brought to you?

A. She asked me for a room and I told Lulu to show her the room. That was all.

Q. What was the purpose, if you know, of her coming to your house? Do you understand my question? I will reframe it. Do you know whether or not she came to your house as a prostitute or as a roomer?

A. Well, they all know what those places are over there. That is all I know.

Q. And you knew, too? A. Why, sure.

Q. Did you ask her how old she was?

A. Yes, sir.

Q. How old did she tell you?

A. Going on twenty-four years old.

Q. She didn't tell you she was only seventeen?

A. Absolutely not.

Q. Did you tell her at that time, when she went to Doctor Scharpenberg or Doctor Chartereis, to report for an examination preliminary to being a prostitute? A. They all do.

Q. Did you tell her that?

(Testimony of Maude Anderson.)

A. I don't just remember. [149]

Q. You could have?

A. I was sick and I don't remember whether I did or not.

Q. That was the custom, wasn't it?

A. They all do that.

Q. Did you tell her to report to the police for finger printing and registering?

A. They all have to.

Q. Did you tell her that?

A. I don't remember.

Q. Do you know whether or not Gloria Bowman reported to Doctor Scharpenberg or Doctor Chartereis, or the Police Department?

A. Yes, she did.

Q. You knew that she did? A. Yes.

Q. You heard Gloria Bowman testify yesterday that you said to her when she came into your room, "You are the new girl from Seattle. I have been expecting you." Is that correct? A. No.

Q. You heard her say that? A. Yes.

Q. It isn't correct? A. No.

Q. You heard her testify that a new room had been built on for a girl? A. No.

Q. What was it for?

A. I am building all the time.

Q. What kind of room was it? A kitchen? A bath? A. It was a bedroom and an alcove.

Q. A room to be used for prostitution, wasn't it?

A. It was a bedroom.

Q. Did Gloria Bowman give you one dollar out of each three that she earned, Mrs. Anderson?

(Testimony of Maude Anderson.)

A. She did not.

Q. Through what channels did the money go through to get to you, if you know?

Mr. Monagle: We object. How would she know where it came from?

Mr. Jernberg: If the Court please, in a lucrative business it would be good practice. Maybe Mrs. Anderson can testify.

A. I was never around any of the money.

The Court: I think we understand the situation.

Q. Now, Mrs. Anderson, did Gloria Bowman start right to work that day, the day she arrived?

A. I couldn't tell you. I wasn't out there.

Q. You testified a minute ago that you received notice she had cleared with the doctor and Police Department and had been given clearance?

A. I can't tell you whether or not——

Mr. Robertson: The witness never testified that she received notice. You asked her if she knew she had reported and she said she did.

The Court: Well, all right. Reframe your question.

Q. You testified here a minute ago that you knew she had reported to the doctor and the Police Department. How did you learn that?

A. I told you they all did. That was customary.

Q. When did she start working as a prostitute in your house?

A. I couldn't tell you. I was under the doctor's care myself at [151] the time.

Mr. Tollefsen: I move that the last remark be



(Testimony of Maude Anderson.)

stricken, and the witness be admonished to refrain from——

The Court: I didn't hear it. Read the answer.

Court Reporter: "I couldn't tell you. I was under the doctor's care myself at the time."

The Court: Just answer the questions. Don't interpose things that are not germane to the question.

Q. I believe you testified a few minutes ago, Mrs. Anderson, that when Margie Miller left the management of the house was turned over to Lulu Coleman?

A. Yes.

Q. Why did she bring Gloria Bowman into your room to see you, do you know?

A. No, I don't.

Q. Wasn't it because you were actually running that house and expecting Gloria Bowman to come and take that room?

A. There was other rooms besides that. There was other rooms. There were two more empty rooms.

Q. For girls you were expecting by airplane?

A. No.

Q. There were three available rooms?

A. That was Margie's room that she had moved out of.

(Recess.)

Mr. Jernberg: May I proceed?

The Court: Yes, you may proceed.

Q. Yesterday, Mrs. Anderson, you testified that you did not have any conversation with Margie

(Testimony of Maude Anderson.)

Miller in November, 1941, regarding girls. Is that correct? [152]

A. That is correct, for myself.

Q. Do you recall whether or not you said yesterday "for myself?" A. I don't remember.

Q. Isn't it true you testified that you didn't have a conversation regarding girls? A. Yes.

Q. Your testimony this morning was that you did have a conversation regarding girls. Is that correct? Do you remember saying that in response to Mr. Monagle's question?

A. I said I didn't have any conversation about girls for myself.

Q. That was this morning you said that?

A. Yes.

Q. You didn't say that yesterday, did you?

A. No.

Q. You testified this morning that you were going to rent a place to Margie Miller and Margie would furnish it. Is that correct?

A. That is correct.

Q. Is that the same place you talked to Mr. Rands—that you testified you talked to Mr. Rands about?

A. Yes, the place next to the Lake View Cottage.

Q. You testified this morning you made an agreement with Mr. Rands?

A. We talked it over, about fixing the house, about building on rooms.

Q. You heard Mr. Rands' testimony yesterday?

(Testimony of Maude Anderson.)

A. I hadn't come to any decision. I asked him what it would cost. He hadn't figured it out.

Q. Had you ever figured out the cost or the plans of the place before Margie left?

A. No, we hadn't.

Q. Did you ever build that place, Mrs. Anderson? [153]

A. No, that place was not built.

Q. Then it is true that you did not have a contract with Mr. Rands?

A. We talked it over, but he hadn't given me any information how much it would be.

Q. Mrs. Anderson, have you ever been convicted of the commission of a crime?

Mr. Monagle: May it please the Court——

The Court: She may answer.

Mr. Monagle: We object unless she is asked if she has ever been convicted of a felony. We take an exception.

The Court: Reframe your question.

Q. I will withdraw the question. Mrs. Anderson, who was Rita Hemp? Did she work for you over there?

A. She worked for me in my private home and took care of my mother and I.

Q. When did she start working for you?

A. 1942; I think it was after my home was built.

Q. In June of 1943 at Sitka, Alaska, did you make this statement to Rita Hemp: "I hope to

(Testimony of Maude Anderson.)

God they never find Margie, because if they do I am a goner?"      A. I never.

Mr. Jernberg: That is all.

Re-direct Examination

By Mr. Monagle:

Q. Mrs. Anderson, Mr. Jernberg asked you if you ever did build this place that you testified you talked about building for Margie Miller, and you answered that you did not build it. Why [154] didn't you build it?

A. War broke out, and I changed my mind about building. I figured we would all be evacuated and didn't want to put anything more out. If we were going to be evacuated I didn't want to build anything.

Q. When Margie Miller returned from Seattle after she had gone south in the fall of 1941 after Thanksgiving or about Thanksgiving time, after she returned from that trip, did you and she have any conversation in Sitka at any time or place as to why you hadn't built that house? Answer "Yes" or "No."      A. I didn't get that.

Q. After Margie Miller returned from the States after her trip of November, 1941, did you and she have any conversation in Sitka about why you hadn't built that house?

A. All I told her was on account of the War breaking out I didn't build and had changed my mind.

Q. What did Margie Miller say?

(Testimony of Maude Anderson.)

A. Well, she got pretty mad about it.

Q. Now, Mr. Jernberg asked you about—questioned you about your conversation with Margie Miller regarding girls. What if any conversation did you have with Margie Miller in Sitka, Alaska, in November, 1941, with reference to girls?

Mr. Tollefsen: I don't believe that is proper cross-examination. That matter was covered on direct-examination.

Mr. Monagle: If the Court please, Mr. Jernberg asked what the testimony was yesterday and what it was today regarding the conversation with Margie Miller about girls. I think the Jury is entitled to hear it.

The Court: She has already testified about it.

Q. Now, Mrs. Anderson, the District Attorney has asked you about this telegram. What effect, if any, did that telegram of itself have on your business?

Mr. Tollefsen: If the Court please, that is a matter to be left to the Jury—what effect it had.

Mr. Monagle: We have a right to explain.

The Court: What the effect was on her business? I don't understand. You can ask what she understood by it. She has already testified that it didn't mean anything to her.

Mr. Monagle: May it please the Court, it is proper to show why it was sent.

The Court: Why?

Mr. Monagle: Sure.

The Court: She testified she didn't know anything about it.



(Testimony of Maude Anderson.)

Mr. Monagle: We objected to its introduction in the first place, that it had no purpose and didn't prove anything.

The Court: That is a matter for the Jury to determine. She has testified already that it didn't mean anything to her, that she didn't know what it was all about—in substance.

Mr. Monagle: Mr. Jernberg says: "When was the soldiers paid," "When did Gloria Bowman get there;" and tied in or tried to tie in Margie Miller, Gloria Bowman, the soldiers' pay day, and to show she worked on that night she arrived; the Government tried to tie that in; and I have a right to show you can't send girls by telegram.

The Court: We all know you can't send girls by telegram.

Mr. Monagle: We have contended all the time that the [156] telegram was not answered and wasn't binding on her. We renew our objection and ask that the Jury be instructed to disregard——

The Court: The Jury heard the testimony in this case, and it is for them to say what the telegram amounts to or what credence they see fit to give it.

Mr. Monagle: We take an exception, if the Court please.

Q. Did you know Margie Miller's address during the period from on or about November 29, 1941?

A. No, I didn't.

Q. Did you know her address at any time within a week before or after, or after that date?

(Testimony of Maude Anderson.)

A. No, I never.

Q. This telegram says: "Air mail—"; this telegram which is Government's Exhibit Number "1," is from Marg, "M-a-r-g," to you. It says: "Air mail two dresses today." Did you have any dresses of Margie Miller's? A. No, I didn't.

The Court: Dresses?

Q. She says: "Air mail two dresses today." It further says: "Send coat on North Coast." Did you have any coat belonging to Margie Miller?

A. No, I never.

Q. Now, Mrs. Anderson, this telegram, which is Government's Exhibit Number "1," has the further words: "Need the three badly." Do you know what those four words mean?

A. Unless it would mean in that cabin. I never bothered about the telegram.

Q. You heard Margie Miller testify it had reference to girls being sent up by airplane and Jean La Rue being sent up by boat. [157]

Now, did you need those three girls, or any other three girls, badly at that time? A. No, sir.

Q. As a matter of fact how large was your house? How many bedrooms?

The Court: She has already testified to that.

Mr. Monagle: I think I have a right—

The Court: I don't see any occasion for going over it again. She has already testified that there were three vacant bedrooms at that time.

Q. Where was Margie working in this house?

Mr. Jernberg: When, Mr. Monagle?

(Testimony of Maude Anderson.)

Q. In November, 1941?

A. She had the bedroom right off the side kitchen.

Q. Was her bedroom vacant or filled when she was gone?      A. It was vacant.

Q. That was one of the three bedrooms that was vacant? One was Margie's bedroom?

A. That is right.

Q. Now, the District Attorney asked you a few moments ago if you knew when Jean La Rue, also known as Gloria Virginia Bowman, started working in the Lake View Cottage in Sitka in 1941, and you answered that you didn't know when she started to work. Why didn't you know when she started working?

A. I was sick in my bed, and I wasn't running the place.

Mr. Jernberg: We object.

The Court: Sustained.

Mr. Monagle: Exception. We have a right to explain why she didn't know.

The Court: It doesn't make any difference. The only [158] pertinent thing is only if she did know.

Mr. Monagle: We take an exception, if the Court please.

Q. You heard the District Attorney ask the question who Rita Hemp was. How old is Rita Hemp?      A. I wouldn't know.

Q. Young or old?

A. Well, she is not young, but I wouldn't know. A colored woman—I never could tell how old they are.

(Testimony of Maude Anderson.)

Q. What were her duties in connection with you?      A. She worked at my home.

Q. Doing house work?

A. Yes, that is right.

Mr. Monagle: I think that is all, may it please the Court.

Re-cross Examination

By Mr. Jernberg:

Q. Now, Mrs. Anderson, you testified that Margie Miller's room was the first room off the kitchen. Is that correct?      A. That is correct.

Q. She quit working for you a week prior to her departure for Seattle. Isn't that correct?

A. That is correct.

Q. This conversation you testified as having with Margie Miller upon her return the following January, 1942, relative to the house, is that the same conversation when she asked you if you collected the \$70.00 from Gloria Bowman?

A. She never asked me about that.

Mr. Jernberg: That is all. [159]

Re-re-direct Examination

By Mr. Monagle:

Q. When Margie Miller came back to Sitka after her trip to the States in November, 1941, do you know why she came back, or did she tell you why she came back?      A. She said——

The Court: We are not going into that.

Mr. Monagle: We take an exception, may it please the Court.

(Testimony of Maude Anderson.)

The Court: It isn't proper Re-direct examination any way and is not responsive to anything that was asked her on cross examination.

(Respective attorneys and Court Reporter approached the Bench, out of hearing of the Jury.)

Mr. Monagle: We offer to prove by this witness on the stand and by other witnesses that Margie Miller came back to Sitka, intending to start her own place of prostitution in a building leased from Maude Anderson, in January, 1942, and had transported Gloria Bowman to Sitka with the intent of having said Gloria Bowman work in said Margie Miller's house of prostitution, and that when Margie Miller returned to Sitka from Seattle in January, 1942, she was quite angry because a building was not ready so she could start her own house of prostitution, and stated in the presence of Lou Dixon Northrup and Irene Holmquist that she would get even with Maude Anderson if it took her the rest of her life.

The Court: You had half a dozen opportunities to ask her this question. It is certainly not proper Re-direct [160] Examination.

Mr. Monagle: The Court ruled me out. I submit to the record. The District Attorney objected and they were sustained on it.

The Court: The offer will be denied.

Mr. Monagle: We take an exception, may it please the Court.



(Testimony of Maude Anderson.)

(Respective attorneys and Court Reporter left the Bench, and were again within hearing of the Jury.)

Mr. Monagle: That is all.

(Witness excused)

The Court: Is there any rebuttal? Are you through (addressing Mr. Monagle)?

Mr. Monagle: We have two witnesses who are subpoenaed to be here, and we have arranged for their transportation by airplane. It has been impossible to get them here. The case was set for trial next Wednesday, and it is no fault of the defendant they weren't here or subpoenaed at an earlier date. We offered to charter a plane, but it hasn't been physically possible to get them here. The airplane company advised me that they would get them here this afternoon if it is possible to get to Sitka and Lena Bay.

Mr. Jernberg: Mr. Rands was here. We object to a continuance. These witnesses reside at Sitka too.

The Court: I don't understand your asking for a continuance.

Mr. Monagle: We are asking for the right to put on our [161] rebuttal testimony.

Mr. Jernberg: Are you resting at this time?

Mr. Monagle: No. We have two witnesses. Both of the District Attorneys know why Mr. Rands was here. I will explain it in the absence of the Jury. I can explain it very easily, if the Court desires.

The Court: The Jury will be excused until 2:00 o'clock.

(Whereupon the Court admonished the Jury, and the Jury retired from the Court Room.)

Mr. Mongle: It wasn't our purpose, and isn't our purpose to delay this trial, but the Court knows there was a case went by the board—the defendant plead guilty—which it was anticipated would be on trial at this present moment. Naturally we didn't subpoena our witnesses who we expected to get. The Government subpoenaed Mr. Rands for the 3rd of April. He was subpoenaed as their witness. He was found favorable to us and unfavorable to them, so I subpoenaed him.

The Court: What about the other witnesses?

Mr. Monagle: The subpoenas are issued and served.

The Court: Have they been subpoenaed?

Mr. Monagle: Yes.

The Court: When?

Mr. Monagle: Day before yesterday. They answered by wire that they would be here as soon as physically possible. They were subpoenaed as soon as we knew this case was on trial. The subpoenas were sent by wire. It was the only physically possible thing we could do. If we had known, we could have got them over here Monday, [162] but no planes flew over here yesterday whatever. I have checked with the airplane company—last night late and also this morning—they thought about two or three they might get over this afternoon.

The Court: I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court.

Mr. Monagle: The calendar was only just set. The other case was set first. We didn't know—the defendant can't afford to bring witnesses weeks ahead like the Government.

The Court: It is just as much to the interest of the defendant to get her witnesses here as the Government.

Mr. Monagle: I don't mind a week ahead. We anticipated that.

The Court: We are not going to wait on them. In any event, if they get here today, or in the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account. Has the Government any rebuttal?

Mr. Jernberg: No, your Honor. The defendant hasn't rested.

Mr. Robertson: The defendant hasn't rested, and we don't intend to rest until they get here. If the Court says we have to, we will make an offer of proof what the witnesses will testify.

Mr. Jernberg: I didn't mean to be repetitious and annoy Mr. Robertson, but the Court asked me if I had any rebuttal, and we don't have to put on any rebuttal until the defense rests, as I understand my procedure, Mr. Robertson. [163]

The Court: There is nothing in the file to indicate that any witnesses have been subpoenaed by the defendant, other than the witness Rands.

The Clerk: There is in the office. It was just returned this morning.

The Court: Well, bring it in.

Mr. Monagle: May it please the Court, we will file with the Court a wire from one of the witnesses to the effect that they will be here as soon as physically possible.

Mr. Robertson: They tried to get an airplane out yesterday, but because of this Taku wind they couldn't get out. We are not trying to delay the Court.

The Court: Is this the only subpoena (indicating a paper from the file of the case)?

Mr. Monagle: Both witnesses are subpoenaed.

The Court: This is for Henry Green, a witness on behalf of the Government.

Mr. Robertson: The subpoenas were wired to Sitka for the deputy to make service. I wouldn't think they had been returned. As a matter of fact, I think the Sitka deputy would make the return.

The Court: The Clerk ought to have some record of it, if any subpoena was issued. Subpoenas are issued by the Clerk. They certainly would have a record in the Clerk's Office.

The Clerk: They were issued, your Honor, for Sitka, but there hasn't been a return on them.

The Court: Look into it. In the meantime Court will stand adjourned until 2:00 o'clock. [164]

The following is a true copy of the subpoena and of the United States Marshal's service thereon, namely:

In the United States District Court for the Territory of Alaska, Division No. 1.

Received April 5, 1945 Crim. Docket No. 26348  
for service by Deputy Bryant

United States of America,  
Territory of Alaska—ss.

The President of the United States of America,

To Irene Holmquist and Lu Dixon Northrup,  
Greeting:

You Are Hereby Commanded to appear before the District Court of the United States, for the Territory of Alaska, at Juneau, in said District, on Thursday, the 5th day of April, A. D. 1945, at 2 o'clock P. M., of that day to testify as a witness on behalf of the Defendant in the case of United States of America vs. Maude Anderson, and depart not the Court without leave thereof or of the United States Attorney. Hereof fail not.

Witness The Honorable Geo. F. Alexander Judge of said Court, and the Seal thereof affixed at Juneau in said Territory, this 4th day of April, A. D. 1945.

[Seal] J. H. WALMER,  
Clerk

By /s/ P. D. E. McIVER,  
Deputy

Filed in the District Court Territory of Alaska,  
1st Division at Juneau Apr. 12, 1945 P. M. J. H.  
Walmer, Clerk. By /s/ P. D. E. McIver, Deputy.



United States of America

Territory of Alaska

Division Number One—ss.

I, Wm. T. Mahoney, United States Marshal, hereby certify that I received the within subpoena on the 5th day of April 1945, at Sitka, Alaska, and that I served the same on the 5th day of April, 1945 at Sitka, Alaska, by reading and showing the original and delivering a ticket containing the substance thereof to each of the within named witnesses, Lu Dixon Northrup and Irene Holmquist, personally and in person except Irene Holmquist. (Irene Holmquist left Sitka, Alaska, April 3rd on board the boat 31C469 for her place at Kalinin Bay)

Dated at Sitka, Alaska, this 7th day of April 1945.

WM. T. MAHONEY,

U. S. Marshal

By /s/ FRED BRYANT

Deputy [165]

(Whereupon Court recessed until 2:00 o'clock P. M. April 6, 1945, reconvening as per recess, with all parties present as heretofore and the Jury in the box; whereupon the following took place:)

The Court: You may proceed.

Mr. Monagle: May it please the Court, the two witnesses I informed the Court about prior to ad-

jourment at noon have not arrived. I checked with the airplane company a few minutes ago.

The Court: Well, we will have to proceed.

Mr. Monagle: In that case I would like to make an offer of what the two absent witnesses would testify to.

The Court: The Jury may be excused until called.

(Whereupon the Court admonished the Jury, and the Jury retired to the Jury Room.)

Mr. Monagle: May it please the Court, we move at this time that the case be continued until the arrival of Lou Dixon Northrup and Irene Holmquist from Sitka. These two witnesses were subpoenaed as soon as the defense knew that the case would be on for trial—that is day before yesterday—and they would have been here if it was possible for an airplane to get to Sitka and bring them here. They were prevented, the plane was prevented from going for and bringing them because of the Taku wind that was blowing yesterday and today. There is no other means of transportation that would get them here in less than sixteen hours, except an airplane. It is physically impossible for them to get here. It has been physically impossible for them to get here by any means of transportation [166] since they were subpoenaed. This case was originally set for next Wednesday for trial and was moved up because in another case the defendant plead guilty and the case did not go to trial. The witnesses could have arrived here

on a regular steamer, on the Northland, bringing them back to Juneau Monday. They would have arrived here not later than next Monday night, which would have been twenty-four hours,—

The Court: You mean last Monday?

Mr. Monagle: No. The Northland went yesterday to Sitka. Had the case come up on the date regularly set for it, they would have been here by Monday and the witnesses would have been here. We offer to prove by these two witnesses that Margie Miller informed them that she intended to set up her own private house of prostitution and obtain girls to work therein, and that Maude Anderson was going to do some work on and enlarge a building so that Margie Miller could use it for a house of prostitution and we offer to prove by these two witnesses the further fact that when Margie Miller returned to Sitka, Alaska, from the States some time during the month of January, 1942, she stated, in substance, to each of these witnesses that she would get even with Maude Anderson for not building this house of prostitution for her in accordance with their agreement if it took her the rest of her life. I might inform the Court that the witness Irene Holmquist is a reputable housewife and has never been a prostitute or connected with prostitution in any way, to the best of our knowledge, and, I believe, has no criminal record of any kind. The witness Lou Dixon Northrup [167] has been a prostitute and was present in the Lake View Cottage in Sitka, Alaska, in November, 1941, when Margie Miller

was working there and when Margie Miller was managing the operations of said house of prostitution; that in the meantime Lou Dixon Northrup discontinued the practice of prostitution and, to the best of our knowledge, has not been practicing prostitution for a period of many months, and recently owned her own small mercantile store in Sitka, which she personally operated, and at present and for sometime last past has been employed as a laborer in the saw mill of the Columbia Lumber Company in Sitka, Alaska, and is and has been for many months living a reputable life. I would like also to add that the fees of the two witnesses have been advanced and arrangements have been made to pay their airplane fare and any delays and the cost of the charter trip on the airplane, and the only thing preventing the witnesses from being here is the inclement weather.

Mr. Jernberg: If the Court please, we haven't much to show about the offer that is material for impeachment purposes. There is no showing of Government witness Margie Miller—it is principally her who they are trying to attack—that she had any conversation with either of the two persons named. Miss Miller didn't testify to that. Apparently they are trying to attack the impeachee on some inconsistent statement she later made. I can't think of any testimony that Miss Miller made that would permit them to impeach her, in any event. Incidentally, I understand the subpoena has not been served. One of the witnesses is at Lena



Bay, and Lena Bay is twenty or [168] thirty miles from Sitka.

The Court: Where is the subpoena?

Mr. Jernberg: The original?

The Court: Where is the subpoena? Has it been returned at all?

The Clerk: It has not, your Honor. They were wired to Sitka, by the United States Marshal.

Mr. Monagle: It was absolutely necessary to send them by wire. They couldn't have gotten over since the case started.

The Court: The subpoena ought to be here then. What about it Mr. Marshal?

The Marshal: It was wired day before yesterday to the deputy in Sitka, with instructions Mr. Monagle gave me that transportation was paid for and arranged and for them to come to Juneau. We got a wire back from the deputy that he served one and the other witness was in Lena Bay.

The Court: Which did he serve?

The Marshal: I would have to look at the wire.

The Court: When did you get your subpoena?

The Marshal: The subpoena was sent to Sitka, the original. He served a subpoena ticket, according to his wire, and notified the plane to pick her up on the way in.

The Court: Which one was served?

The Marshal: I would have to go look.

Mr. Monagle: I can inform the Court that it was Lou Dixon Northrup. She wired that she got it. I would like to point out, and the record will show, that Mr. Robertson asked Margie Miller if



she knew Irene Holmquist, who [169] she was, how long she had known her, and whether or not she had a conversation with her in connection with the institution of her house of prostitution. I also submit he asked Margie Miller on the stand if she personally didn't know Lou Dixon Northrup, and thereby laid the foundation for the impeaching question.

The Court: That would not be sufficient ground for what you are seeking now to do.

Mr. Monagle: May it please the Court, he asked the witness Margie Miller the direct question and she denied it.

The Court: If she had a conversation with her?

Mr. Monagle: And if she had a conversation about setting up her own private house of prostitution, and if she hadn't threatened to get even with Maude Anderson.

The Court: That isn't what you stated in the beginning.

Mr. Robertson: I laid the foundation of the impeaching question of Miss Miller for both those witnesses, that she made threats against Mrs. Anderson. The record will show it. I laid the foundation and properly it shows she has onus against the defendant.

The Court: In any event, and whether you did or not, that is the very essence of your defense in this case, that this is a piece of spite work on the part of the prosecuting witness, and you do know that you must have that in even before the defendant is entitled to impeach, but that is no excuse

for not having the witnesses here. It is true I called a criminal calendar last Friday, which was the 30th of March, and I set the calendar tentatively, but I notified all defendants and their [170] attorneys to be ready at all times whenever their cases were called. I only set a time tentatively and as a matter of convenience. The defendant has been here in time, to my knowledge for at least ten days or two weeks. There is no reason why, if these witnesses were available, they shouldn't have been here. The motion for continuance will be denied.

Mr. Monagle: We ask for an exception, if it may please the Court.

The Court: Is there any other rebuttal?

Mr. Jernberg: No rebuttal, if the Court please.

Mr. Robertson: Before the Court calls in the Jury——

The Court: I understand the defense rests?

Mr. Robertson: The Court overruled our offer. We rest subject to our motion and exception.

The Court: The Court ruled on the motion. I am asking if there is anything further, if the defense rests?

Mr. Robertson: We have nothing further. We move the Court to instruct the Jury to return a verdict of not guilty against the defendant on the grounds that the Government entirely failed to make out a case. I rest this on—I am willing to rest this motion on this single point, your Honor—the indictment charges that on the 25th day of November, 1941, at Sitka, Alaska, and within the

jurisdiction of this Court, defendant “did, wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to wit: Gloria Virginia Knapp Bowman, alias [171] Jean La Rue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States and the Territory of Alaska.” I make my point entirely upon the fact—“transport and cause to be transported and aid and assist in obtaining transportation.” I submit to your Honor for one to transport another or cause to be transported for immoral purposes, contrary to this statute, that either the defendant must personally transport or must do some actual thing that causes the other to be transported, and that to aid and assist, aid means to help, assist means to help, and that, so far as I have been able to find, there are no decisions on that particular point, but I submit in this case that there isn’t a single iota of evidence that this defendant transported this girl Jean La Rue, that she caused her to be transported, supplied any means that caused her to be transported, or that she aided, that is that she supplied any means which helped to transport that girl from Seattle to Sitka. I submit, your Honor, even at this time for the purpose of this motion, assuming the woman Margie Miller’s story is correct that

the defendant promised and agreed that she would repay her for such money as she expended in transporting that girl from Seattle to Sitka, that as a matter of fact a promise and agreement is not either transportation or aid in transportation, unless the promise or agreement is complied with by the accused having actually furnished or paid part of the means by which she was transported. [172]

The Court: I don't agree.

Mr. Roberson: I don't suppose you would.

The Court: I mean the point you just mentioned, and that she had actually to pay it.

Mr. Robertson: I don't say she actually had to pay the money, but she has to actually supply or help to supply the means by which she is transported, and there isn't a single bit of evidence in this case other than the promise—Margie Miller's statement that she promised and agreed that she was going to. There is no evidence which warrants this case going to the Jury, that she ever did promise and agree, and there is no outside evidence to corroborate her either as an accomplice or an agent. The only evidence I can see is this girl Jackie Lugo who ran in the room for two minutes and heard them talking about a code. There is no other independent evidence. Certainly a telegram by one person to another—that telegram is the alleged agent's verbiage, not the defendant's verbiage at all. There is no evidence at all to take this case to the Jury against this woman at this time.



The Court (addressing Mr. Jernberg): Do you wish to be heard?

Mr. Jernberg: If the Court please, regarding the second part of Mr. Robertson's motion he says that the testimony of Jackie Lugo does not supply sufficient corroboration to satisfy the statutes regarding accomplice's testimony. Then it is very difficult to see what would be necessary corroboration. Jackie Lugo did say she entered the room and they did plan this code, which was in fact conspiracy, and as an outgrowth both parties were charged, and she [173] heard them planning a code about girls. Margie Miller well knew what they were talking about, and the inference is that she knew exactly what they would be talking about. We maintain that fact, plus Gloria Bowman's testimony that Maude Anderson asked her for the fare in the amount that Mrs. Miller supplied, is sufficient corroboration to take it out of the statute which forbids conviction based on the testimony of an accomplice without corroboration.

Mr. Robertson: I made a motion the other day to strike Margie Miller's testimony. I called your attention, I think, to Section 5238.

The Court: You mean the corroboration statute?

Mr. Robertson: Yes, sir.

The Court: I am familiar with that.

Mr. Robertson: Here it is. Of course this is not a conspiracy charge, for one thing, but this statute 5352—first, I will read the whole section. It is very short. "A conviction can not be had upon the testimony of an accomplice unless he be



corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission." Now, I submit, if the Court please, that clause qualifies it. You have to have good evidence, strong evidence, positive evidence, to prove it. The law about agency—I don't think there is any. I called attention to 22 Corpus Juris 376 the other day. The charge against a principal has to be supported other than by an agent, otherwise the agent could bind anyone. [174]

The Court: The law is also if they aid or abet or assist in a crime that they are guilty as principals. As to the matter of corroboration, there is no doubt in the Court's mind on that question. The prosecuting witness testified here before she went south that had an understanding with the defendant here that she was to get her three girls, if she could, and that they agreed upon a code that the prosecuting witness was to use in notifying her as to what she did. She told the Jury what that code consisted of. Shortly after she arrived in Seattle she found some girls that were willing to come up here and wired the defendant accordingly, and according to the code she says that they had previously agreed on. When the girl does arrive up here—the first one arrives here—she was told by the prosecuting witness to go to the house of the defendant—and she said, she told the Jury that as soon as she got off the boat she ordered a cab to take her over to the

house of prostitution run by the defendant. She knew exactly what she was coming for and came for that purpose. She said she had been a prostitute before and came with her eyes wide open. She said the first thing defendant said was, "Oh, you are the girl from the States," and ordered her immediately to go to the doctor and be examined and go and register with the police—that seems to be a regular part of the procedure over there—and that she went to work the same day at her occupation for which she was hired. Now, if that isn't corroboration, then I don't know what it would need, what corroboration would be needed. Of course, summed up it means largely whether the Jury is going to [175] believe the prosecuting witness or the defendant, but it is not a matter for the court to say. There is certainly more than ample evidence to go to the Jury, and it is for the Jury to say as to whether or not this arrangement did exist and whether it was carried out, in other words whether the allegations of the indictment have been proved. To my mind there is no question in the world about the corroboration—that is about the evidence—I am not expressing any opinion as to the weight of the evidence—but certainly there is infinitely more there in the way of corroboration than has ever been held necessary in any case that has ever come under my observation. The motion will be denied.

Mr. Robertson: We take an exception, your Honor.

The Court: Exception will be allowed. Call the Jury.

Thereupon defendant requested the Court to instruct the Jury, which request the Court refused, as follows:

Defendant's Requested Instruction No. ....

You are instructed in this case, before you can find the defendant guilty, you must find beyond a reasonable doubt that the defendant did wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, the witness Gloria Virginia Knapp Bowman alias Jean LaRue from Seattle to Sitka.

And unless you find that the defendant did so transport, cause to be transported, or aid and assist in obtaining transportation for such witness Bowman you must find the defendant not guilty. And you are instructed that to transport or cause to be transported means that the defendant either herself transported or else furnished the means to transport, and that to aid or assist in obtaining transportation means to furnish means which either did or helped to transport such witness Bowman from Seattle to Sitka, and that a promise or agreement by defendant to furnish the means [176] of such transportation, if she did not actually furnish such or any of such means of transportation, does not constitute the defendant guilty of the crime with which she is charged.

Thereupon argument was had by counsel for the respective parties and thereafter the Jury was duly

admonished and the Court then recessed until 10:00 o'clock A.M. the following day, April 7, 1945, at which time it reconvened and thereupon at 9:55 A.M., April 7, 1945, defendant requested the Court to instruct the jury, which request the Court refused, and who then endorsed upon said request: "Presented at 9:55 a. m. Sat. a. m. too late for consideration under our rules. Case finished Friday, 4:30 p.m. and jury instructed Saturday, 10 a.m.", as follows:

### Instruction No. 5

You are instructed that acts or declarations, which were done or made by the witness Margerie Miller and which were claimed to be done or made by her on behalf of the defendant, in any wise connected with the alleged commission of the crime charged in the indictment herein are not to be considered by you in your deliberations unless you find beyond a reasonable doubt from evidence, other than the testimony of said witness Miller, that said witness Miller was the agent of the defendant in doing said acts or making said declarations.

In other words the witness Miller cannot by her own acts or declarations establish herself to have been the agent of the defendant in the alleged commission of said crime because the relation of agency, if any, between the witness Miller and the defendant must be established by affirmative evidence other than the acts, statements or declarations of the witness Miller.

You are therefore instructed that regardless of what acts or declarations the witness Miller admit-



ted she did or made in the commission of said crime, you should not find that she did or made any of them as agent of the defendant unless you first find beyond a reasonable doubt from other evidence than said witness Miller's testimony, as hereinabove instructed, that said [177] witness Miller then and there was the agent of the defendant.

Thereupon at 9:55 a.m., April 7, 1945, the defendant requested the Court to instruct the Jury, which request the Court refused, and who then endorsed upon said request: "Presented at 9:55 a.m. Saturday a.m. too late for consideration under our rules. Case finished Friday, 4:30 p.m. and Jury instructed Saturday, 10 a.m.", as follows:

#### Instruction No. 6

The laws of Alaska provide that the testimony of an accomplice ought to be viewed with distrust and that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

You are therefore instructed that you cannot find the defendant guilty of the crime charged in the indictment herein upon the testimony of the witness Miller alone or upon her testimony and other corroborative evidence which tends, if you so find, to connect the defendant with the commission of said crime but which corroborative evidence merely



shows, if you so find, the commission of said alleged crime or the circumstances thereof.

You are further instructed that you must find the defendant not guilty unless you find beyond a reasonable doubt that the witness Miller's testimony, if you find therefrom beyond a reasonable doubt that she and the defendant were accomplices in the commission of the crime charged in the indictment, was corroborated by other evidence and that such other corroborative evidence not only tended to connect the defendant with the commission of the crime charged in the indictment herein but also was of such nature that you find beyond a reasonable doubt that it more than merely shows the commission of said crime or the circumstances thereof.

That the following is a copy of Rule 30 of the Court [178] in effect at all times during the trial of said cause, namely:

“Rule 30—Instruction to Jury.

In every case, civil or criminal, tried before a jury, the attorney for each side may, as soon as the jury is impanelled, submit to the court copies of such requests for instructions as he desires the court to charge; additional requests may be submitted at any time before the argument on the submission of the case to the jury is concluded; each request shall be on a separate sheet of paper, and counsel may cite thereunder the authorities supporting each request.”

Thereupon at 10:00 o'clock a.m., April 7, 1945, the Court charged the Jury as follows:

Same Title of Court and Cause.

Court's Instructions to the Jury.

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the [179] law that will govern you in your deliberations upon the facts in this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the Government of the United States and the defendant, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but your verdict should be the result of a careful consideration of all the evidence in the case and the instructions of the Court as to the law in the case.

It is not for you to say the law should be one thing or another, but you should follow the instructions of the Court in that respect. It is the exclusive province of the Court to declare the law of the case and it is your duty as jurors to follow the instructions the Court may give you in your deliberations and in arriving at a verdict in this case.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the

trial of the case rests upon you, because you are the triers of the facts.

### No. 2

The charge on which the defendant is on trial before you is contained in the Indictment returned against her by the Grand Jury, which reads as follows:

“The Grand Jurors of the United States and the Territory of Alaska, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present that Maude Anderson [180] on or about the 25th day of November, 1941, at Sitka, in Division Number One, Territory of Alaska, and within the jurisdiction of said Court, did, willfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States and the Territory of Alaska.”

### No. 3

The statute which the defendant is charged with having violated is Section 398, Title 18 United States Code Annotated; 36 Statute 825; which provides:

“Section 398. Transportation of Woman or Girl for Immoral Purposes, or Procuring Ticket. Any

person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished," etc.

You will note that the specific charge against the defendant is that she did on or about the 25th day of November, [181] 1941, at Sitka, in Division Number One, Territory of Alaska, and within the jurisdiction of this Court, willfully, unlawfully,



feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska.

In this connection I instruct you that the essential elements of the offense charged are:

First. That the offense charged took place at Sitka, Alaska, and within the First Division of Alaska and within the jurisdiction of this Court, on or about the 25th day of November, 1941, the exact time being immaterial, provided it took place within three years prior to the finding of this indictment.

Second. That at said time and place said defendant did transport or cause to be transported, or aided or abetted or assisted in obtaining transportation for and in transporting, in interstate commerce (that is, from the City of Seattle, in the State of Washington, to Sitka, in the Territory of Alaska), one Gloria Virginia Knapp Bowman, alias Jean LaRue, for the purpose of prostitution or for immoral purposes.

Third. That said Gloria Virginia Knapp Bowman, alias Jean LaRue, was so transported for the purpose of prostitution or for immoral purposes.

Fourth. That the defendant did the acts alleged in the indictment, willfully, that is purposely; un-



lawfully, that is against the law; feloniously, that is wickedly and against the admonition of the law and maliciously; and knowingly.

If the Government has proven each of these elements to your satisfaction beyond a reasonable doubt, then you should find [182] the defendant guilty as charged.

If the Government has failed to prove any of these elements to your satisfaction beyond a reasonable doubt, or you entertain a reasonable doubt thereon, you will find the defendant not guilty.

In this connection you are also instructed that Sitka, Alaska, is in Division Number One of the Territory of Alaska, and within the jurisdiction of this Court.

#### No. 4

The indictment in this case, as in all cases, is merely the formal accusation presented against the defendant by the grand jury. You can indulge in no presumption against her simply by reason of the fact that she has been indicted, because an indictment is no evidence of guilt.

The defendant has pleaded not guilty to the indictment. That plea denies and puts in issue every material averment of the indictment, and cases upon the Government the burden of proving every such averment to your satisfaction beyond a reasonable doubt.

A "reasonable doubt" as here used, does not mean just any whimsical, arbitrary or purely speculative doubt or guess which may occur to your minds regarding the guilt of the accused, nor mere excuses

that you may conjure up without foundation or out of sympathy for the accused or out of a kindness of heart. Nor does it mean the unfounded bare possibility of the defendant's innocence.

A "reasonable doubt" in this connection, is such a condition of the mind as results from a careful and impartial comparison and consideration of all the evidence, or lack of evidence before you, and makes it impossible for you to candidly and truthfully say, in your own minds, upon your oaths as jurors, that you have an abiding conviction, to a moral certainty, of the truth of the charge. [183]

#### No. 5

In the prosecution of this case the Government relies to some extent upon the testimony of Marguerite Miller. Marguerite Miller is admittedly an accomplice in the crime charged against the defendant.

"Accomplices" are defined as all persons who participate in an offense as principals, and "principals" as all persons acting together in the commission of an offense.

Our statute provides:

"Section 5044, Compiled Laws of Alaska, 1933.—Principals, who Deemed Such. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

You are, therefore, instructed that, if you believe from all the evidence in this case beyond a reasonable doubt that the defendant Maude Anderson was concerned in the commission of the crime charged or aided or abetted in its commission, though not present, and whether she directly committed the act constituting the crime or merely aided or abetted in its commission, though not present, you may find her guilty as a principal.

No. 6

You are instructed that our law also provides:  
Section 5352, Compiled Laws of Alaska, 1933.

“Sec. 5352. Testimony of Accomplice Must be Corroborated. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.”

In this connection I instruct you that the witness Marguerite Miller is what is known in law as an accomplice, and I further instruct you that the corroboration required by the statute is corroboration of the accomplice's testimony to the effect that the defendant Maude Anderson did actually [184] commit the act constituting the crime charged, or aided or abetted in its commission. It is not necessary, however, that the defendant be present at the time the arrangements were perfected pursuant to which Jean LaRue came to Sitka, if you believe such ar-

rangements were made, or that the defendant paid her transportation or any part thereof. It is sufficient if she agreed with or directed the witness Marguerite Miller that she, the said Marguerite Miller, should procure a girl or girls for her to be transported in interstate commerce for the purpose of prostitution or other immoral purposes, or agreed to pay such girl's transportation or other expenses in connection therewith, and that pursuant to such agreement or directions that the witness Marguerite Miller procured the girl Jean LaRue to come from Seattle, Washington, to Sitka, Alaska, for the defendant, for the purpose of prostitution or other immoral purposes and that defendant agreed to reimburse or pay the witness Marguerite Miller for said girl's transportation or expenses or any part thereof. (Page 7)

I further instruct you that in consideration the guilt or innocence of the defendant you may take into consideration all of the facts and circumstances tending to connect the defendant with the commission of the crime charged, as well as that above mentioned, and if, after a full and fair consideration thereof, you find beyond a reasonable doubt that the defendant did commit the crime charged or aided or abetted or assisted in its commission, at the time and in any of the ways or manners charged in the indictment, then you will find the defendant guilty as charged. If you do not so find, you will find the defendant not guilty. (Page 8) [185]



## No. 7.

The law presumes every person charged with crime to be innocent, and this presumption is not merely a matter of form, but is a right guaranteed by law to every person accused of crime. This presumption of innocence continues with the defendant throughout all the stages of the trial and until the jury has found that this presumption has been overcome by the evidence of the Government in the case beyond a reasonable doubt as to each and every material fact. This rule as to the presumption of innocence is a humane provision of the law, intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment.

## No 8.

The defendant has offered herself as a witness in her own behalf. In this connection you are instructed that while the law makes the defendant a competent witness in this case, yet you have a right to take into consideration the fact that she is the defendant and her situation and her interest in the result of your verdict, and all the circumstances which surround her, and to give to her testimony such weight as, in your judgment, it is fairly entitled to. In other words, when the defendant offers herself as a witness in the case and testifies in her own behalf she becomes as any other witness in the case and her credibility and the weight of her tes-



timony are to be subjected to the same tests as are applied to other witnesses.

No. 9.

You, Ladies and Gentlemen, subject to the law as contained in these instructions, are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses and of the effect and value of evidence addressed and submitted to you at the trial, except where such evidence is declared by the [186] Court to be conclusive.

You are, however, instructed by the Court that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses upon the stand, their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing and knowing

the facts; the probability of the truth of their testimony; their intelligence or lack of intelligence, and all the other facts and circumstances given or appearing in evidence surrounding the witnesses at the trial.

You are not bound to find in conformity with the declaration of any number of witnesses which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness except as noted as to an accomplice whom you find is entitled to full credit is sufficient for proof of any facts in this case, and a witness willfully false in one part of his testimony may be distrusted in other respects. Whenever it is possible you will reconcile the testimony. Where, however, it is not possible to do so, you should give credence to that testimony [187] which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements of counsel and the arguments of counsel are not evidence; and unless supported or borne out by testimony received in the case are not to be considered by you as such.

In considering your verdict you are instructed that any testimony which has been ordered stricken by the Court should not be considered by you for any purpose.

I also instruct you that the matter of punishment is not your concern and should not be considered by you for any purpose. Your duty consists wholly

in finding the guilt or innocence of the defendant on the offenses charged. The matter of punishment is exclusively for the Court.

No. 10.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty, is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

I think, Ladies and Gentlemen, that during the trial I [188] have made no comment on the facts and expressed no opinion in regard thereto; but if I have, or if you think I have, it is your duty to disregard that opinion entirely, or anything I may have said indicating such to you, because the responsibility for the determination of the facts in this case rests upon you and upon you alone, and should be decided by you solely from the evidence submitted in the case.

## No. 11.

When you retire to your jury room you may take with you the indictment, the admitted exhibits and these instructions.

You will then elect one of your number Foremen, whose duty it will be to represent you and speak for you in court and sign the verdict you agree upon. All twelve of you must concur in any verdict you reach.

You will be given one form of verdict. On this form of verdict you will find a blank before the word "guilty." If you find the defendant not guilty, you will write the word "not" in the blank before the word "guilty." If you find the defendant guilty, you will draw a line through the blank before the word "guilty."

After you have agreed upon verdict, you will return it into court according to the facts as you find them.

You may now retire and consider your verdict, without fear and without favor, without sympathy, passion or prejudice, and a true deliverance make between the Government and the prisoner at bar, on your oaths as jurors.

Thereupon defendant then and there duly excepted, as hereinafter stated, to the the hereinafter quoted portions of the Court's instructions, to which particular portions of said instructions the Court's attention was then called, namely: [189]

Mr. Robertson: The defendant takes exception to Court's Instructions No. 5, page 6, and calls the Court's attention to the fact that the language,



in the defendant's opinion, puts a burden upon the defendant as though it was admitted in the case that she is an accomplice, whereas the only admission, by our view, is the admission of Margie Miller that she is an accomplice. I submit the burden is upon the Government to prove that the defendant is an accomplice of Margie Miller.

The Court: I say that Margie Miller has admitted being an accomplice.

Mr. Robertson: We also take exception to the Court's Instruction No. 6. In that connection I call attention to Defendant's Requested Instruction 5 and 6 and the Requested Instruction I handed the Court yesterday. We feel in that that the Court's instruction does not bring out the fact that the statute requires that the corroborated evidence of an accomplice must go further than simply tending to connect the defendant with the commission of a crime. It isn't sufficient if it merely shows the commission of the crime or the circumstances of the commission of the crime, and it seems to us that the Court's language, particularly in lines 8 to 15 on page 7 of Instruction No. 6, does not thoroughly bring out that fact or that statute. We also except to lines 14 to 32 on page 7 of Instruction No. 6, because we contend that is contrary to the law, that the defendant must have actually done something other than making an agreement or a promise, that she must have either actually caused the transportation or supplied means to aid or help in the transportation, as we tried to set forth in the Requested Instruction 1 we filed with the Court yesterday.



Whereupon, after the parties orally agreed that the jury might return a sealed verdict, the jury retired and thereafter on April 9, 1945, returned into open Court its verdict which was [190] in words and figures as follows:

“We, the jury, duly empanelled and sworn to try the above entitled cause, find that the defendant Maude Anderson is guilty as charged in the indictment.”

which verdict was thereupon filed.

Be It Further Remembered, that thereafter, to-wit, on the 10th day of April, 1945, the defendant duly and regularly filed her motion for acquittal, which is in words and figures as follows, to-wit:

Same Title of Court and Cause.

#### DEFENDANT'S MOTION FOR ACQUITTAL

Comes now the defendant and moves that judgment for her acquittal be made and entered herein and renews her certain motion, which she respectfully submits was in substance a motion for acquittal, which she made in open court at the conclusion of the evidence at the trial of the above cause and in which motion she moved that the Court direct the jury to return a verdict herein that she was not guilty.

This motion is based upon the records and files herein and within five days after the jury in the above case was discharged and returned its certain verdict herein finding her guilty, which verdict was

filed herein on April 9, 1945, and which verdict is contrary to both the law and the evidence.

Respectfully submitted,

/s/ M. E. MONAGLE,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

That thereafter, to-wit: on the 2nd day of May, 1945, said motion for acquittal of defendant came regularly on for hearing and the Court being fully advised in the premises overruled and denied the same, to which ruling and Order of the Court the defendant, by counsel, then and there excepted.

(Order entered Journal No. 17, at page 4.) [191]

Be It Further Remembered, that thereafter, to-wit: on the 10th day of April, 1945, the defendant duly and regularly filed her motion for Judgment notwithstanding the Verdict, which is in words and figures as follows, to-wit:

Same Title of Court and Cause.

**MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

Comes now the defendant and respectfully moves that, notwithstanding the verdict of the jury heretofore filed herein on April 9, 1945, Judgment be entered herein discharging the defendant, upon the ground that said verdict was contrary to both the law and the evidence adduced at said trial.

Respectfully submitted,

/s/ M. E. MONAGLE,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

That thereafter, to-wit: on the 2nd day of May, 1945, said motion for Judgment notwithstanding the Verdict came regularly on for hearing and the Court being fully advised in the premises overruled and denied the same, to which ruling and order of the Court the defendant, by counsel, then and there excepted.

(Order entered Journal No. 17, Page 4.)

Be It Further Remembered, that thereafter, to-wit, on the 10th day of April, 1945, the defendant duly and regularly filed here motion for a new trial, which is in words and figures as follows, to-wit:

[Title of District Court and Cause.]

#### MOTION FOR A NEW TRIAL

Comes now defendant and respectfully moves that she be granted a new trial upon the following grounds, to-wit:

1. Irregularities occurring at said trial and the exercise of abusive discretion by the trial Judge, by which this defendant was prevented from having a fair trial, in that: the Court at the trial refused to grant the defendant time for the arrival of Lou Dixon and Irene Holmquist, who were material witnesses to her defense and who would have impeached the witness Marjorie Miller and shown that the latter had told said Dixon and Holmquist that she, Miller, was aggrieved at defendant and intended to get even with her even though it took all the rest of her, Miller's, life, notwithstanding that subpoenas had been issued for said Dixon and

Holmquist and defendant in good faith had arranged to bring them to Juneau to testify at the trial in her defense by airplane, which was the only available means of transportation but which airplane could not go from Juneau to the places where said Dixon and Holmquist were and return them to Juneau because a strong storm, known locally as a Taku wind, prevailed in Juneau and also in that area of Southeastern Alaska through which said airplane had to travel in order to pick up [193] said witnesses and bring them to Juneau, which said storm prevailed throughout April 5th and 6th, 1945, on which days defendant's trial in this cause was being held in Juneau, and which storm prevented airplanes flying on said days, and that defendant had no means of anticipating that such storm would arise and that she would be unable to obtain the attendance of said Dixon and Holmquist; all of which more fully and clearly appears in the stenographic notes of the official court stenographer, taken at said trial, which by reference thereto are hereby made a part hereof.

2. For numerous errors committed by the trial Judge in said trial, to which exception was taken by the defendant at said trial, and all of which appear in the stenographic notes of said official court stenographer, which notes by reference are hereby made a part hereof, and particularly in admitting evidence, over defendant's objections, adduced by the witnesses Miller, Bowman, Kavander and Mansfield, and in admitting in evidence, over defendant's objections, plaintiff's Exhibits Nos. 1

and 2, and in refusing to receive, though duly offered, certain evidence, as appears in said stenographic notes, from defendant and from the witness Rands.

3. Error committed by the Court, to which exception was duly taken, in giving to the jury his instructions 5 and 6, and not giving in substance and effect that certain written requested instruction filed with and presented to the Court on April 6, 1945, or defendant's certain two requested instructions Nos. 5 and 6.

4. That the evidence adduced at said trial was insufficient to justify that certain verdict finding the defendant guilty, which verdict was filed herein on April 9, 1945, and that [194] it is against the law, and that said verdict is contrary to the weight of evidence and is not supported by substantial evidence.

5. The court erred in denying defendant's motion, which was in substance and effect a motion for acquittal, made by her at the conclusion of the evidence, in which she moved that the Court direct the jury to return a verdict finding her not guilty.

6. That defendant was substantially prejudiced and denied a fair trial by reason of the following circumstances: The attorney for the government, in his final argument before the jury, over defendant's objections, stated what purported to be the law governing violations of the statute of which by the in-



dictment herein the defendant was accused of having violated.

Respectfully submitted,

/s/ M. E. MONAGLE,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Copy received April 10, 1945.

/s/ R. L. JERNBERG,

Assistant United States Attorney.

[Endorsed]: Filed April 10, 1945 p.m. [195]

That thereafter, to-wit: on the 2nd day of May, 1945, said Motion for a New Trial came regularly on for hearing and the court being fully advised in the premises overruled and denied the same, to which ruling and order of the Court the defendant, by counsel, then and there excepted.

(Ordered entered Journal No. 17, Page 4.)

And thereafter and on May 4, 1945, the Court made and entered its Judgment and Commitment herein, to-wit:

(Same Title of Court and Cause.)

### JUDGMENT AND COMMITMENT

Now, to-wit, on this 4th day of May, 1945, this matter came before the Court for the imposition of sentence upon the above named defendant, Maude Anderson, upon the verdict of the Jury, duly im-

paneled, sworn and charged in the above-entitled cause, by which verdict the said defendant was found guilty of the crime of Knowingly Causing And Aiding Transportation Of A Woman in Interstate Commerce For Purpose of Prostitution, in violation of Title 18, U. S. C. A., Section 398, as charged in the Indictment heretofore on the 24th day of October, 1944, returned by the Grand Jury and filed herein; the defendant being present in person and represented by her counsel, M. E. Monagle and R. E. Robertson; R. L. Tollefsen, Assistant United States Attorney, appearing for and on behalf of the United States; the defendant being asked if she had any good and sufficient reason to state why sentence should not now be imposed upon her, to which she offered none, and the Court being fully advised in the premises,

Hereby Orders, Adjudges and Decrees that it is the Judgment of the Court that the defendant, Maude Anderson, is guilty of the crime of Knowingly Causing And Aiding Transportation Of A Woman In Interstate Commerce For Purpose Of Prostitution, in violation of Title 18, U.S.C.A., Section 398, as charged in said Indictment, and it is the Sentence of the Court that the defendant [196] be imprisoned in the Federal Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of Three (3) Years, and that the defendant pay to the United States of America a fine of Two Thousand Five Hundred Dollars (\$2,500.00), that it have execution there-

for, that the defendant be committed to said Penitentiary until said fine is paid, and that said defendant stand committed until the sentence herein imposed is fully executed and paid, and

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein.

Done in open Court this 4th day of May, 1945.

/s/ GEO. F. ALEXANDER,  
District Judge.

Entered Court Journal No. 17, Page 20.

[Endorsed]: Filed May 8, 1945, p.m.

And thereafter and within less than five days of the entry of said Judgment and Commitment and on May 8, 1945, the defendant filed her Notice of Appeal herein.

Whereupon, on defendant's motion the Court allowed the defendant ninety days in which to file a transcript of the record, and ninety days within which to make and file her Bill of Exceptions and have said Bill of Exceptions allowed, and ninety days within which to make and file her assignment of errors.

And thereafter on August 4, 1945, and within the time allowed therefor, and at the same term of Court at which said Judgment and Commitment

was made and entered, the Defendant filed herein her Bill of Exceptions and Assignment of Errors. Thereafter, in pursuance to Plaintiff's motion, amendments were made to the said Bill of Exceptions so heretofore filed by Defendant, and [197] thereupon in pursuance to orders from time to time duly made and entered as to the time for Defendant to present and have settled and allowed her Bill of Exceptions, the following order was made and entered:

#### ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS

Now on this day the foregoing Bill of Exceptions having been filed herein on August 4, 1945, and having thereafter been amended in accordance with Plaintiff's motion and now being presented to me within the time allowed for the filing thereof by order and the rules of this Court and at the same term of Court at which Judgment was entered herein on May 4, 1945, sentencing the defendant to serve three years in the penitentiary and to pay a fine of \$2,500.00,

Therefore, I, Geo. F. Alexander, District Judge for the First Judicial Division of the Territory of Alaska, who presided at the trial of the above entitled cause do hereby certify that the foregoing Bill of Exceptions is correct and speaks the truth in every particular and contain all the proceedings, evidence, Court's instructions, material facts, matters and things, objections, ruling and exceptions

thereto occurring upon the trial of said cause and not heretofore made a part of the record herein; and also a full and complete copy of Rule No. 30 of this Court now and during all of said proceedings in full effect and force; and

I further hereby certify that the foregoing Bill of Exceptions complies with all the rules of this Court relative to the presentation, settlement and filing of the Bill of Exceptions and with all orders made by me relative thereto, and that said Bill of Exceptions was presented and is hereby settled and allowed within the time prescribed for that purpose at the same term of Court at which said Judgment was rendered and entered.

Done in Open Court this 27th day of August, 1945.

GEO. F. ALEXANDER,  
District Judge.

Approved as amended.

R. L. TOLLEFSEN,  
Acting U. S. Atty., Aug. 25,  
1945.

O. K.

HOWARD D. STABLER,  
For Deft.  
M. E. MONAGLE,  
For Deft.

[Endorsed]: Filed Aug. 4, 1945. [198]



[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes now the defendant Maude Anderson, by her attorneys, and respectfully assigns in connection with her petition for appeal herein, the following errors committed in the proceedings and the trial of the above entitled cause, which she intends to urge upon the hearing of the appeal herein and upon which she relies to reverse the judgment entered herein on May 4, 1945, against her whereby she was sentenced to be imprisoned in the United States penitentiary at McNeil Island, Washington, or such other institution as the Attorney General of the United States might direct, for a period of Three (3) Years, and to pay a fine of Two Thousand Five Hundred (\$2,500.00) Dollars, and ordered to stand committed until such sentence was fully executed and paid:

#### I.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Marguerite Miller, namely:

Q. Who was the girl?

A. This Gloria Bowman.

Q. What took place?

A. I asked her if she wanted to come up here.

Mr. Monagle: We object to any conversation that took place there as not being in the presence of the defendant.

Mr. Jernberg: She hasn't been asked that.

The Court: You can't ask what the conversa-

tion was but you can ask what was done or what arrangements were made.

A. I made arrangements with her to come up here and to leave on the same boat I went down on, to be in time for the soldiers' pay day. I advanced her \$70.00 of my own money.

Q. For what?

A. Transportation, cab fare, and some money to have while on the boat, a little bit to spend.

Q. Was any arrangement made for repayment?

A. I told her to give the money to Maude.

Mr. Monagle: We object to any conversation regarding arrangements down there.

The Court: What arrangements? With who?

Mr. Tollefsen: Gloria Bowman.

The Court: By this witness?

Mr. Tollefsen: Yes.

The Court: I don't think it is material any way.

Mr. Tollefsen: If the Court please, we have already established that the witness was acting for the defendant. Consequently the arrangements made between the defendant and this witness have to be carried through this witness to the third party, and are binding on the defendant if the jury is convinced beyond a reasonable doubt.

Mr. Monagle: We don't agree that is the law. Any conversation that took place between this witness—or any conversation, unless in the defendant's presence——

The Court: It would be if she was acting as agent. [200]

Mr. Monagle: There is no foundation.

The Court: She testified that she arranged, before she went down, with the defendant that if the girls were not able to do so that she was to pay the fare and would be reimbursed when she got back.

Mr. Monagle: She also testified that she made arrangements to get a place of her own from Maude Anderson. That is her testimony.

The Court: I don't recall that.

Mr. Monagle: I submit to the Court Reporter.

Mr. Tollefsen: That would be taking it out of the jury's hands at this point. It has certainly been established, if they believe her testimony, that there is an agency there and that she was procuring girls for the defendant, and we are entitled to go into that. She was acting as agent for the defendant. If the jury doesn't believe an agency existed, they can find some other possible explanation. That does not make it inadmissible.

The Court: I didn't hear that.

Mr. Monagle: I submit that she testified she was running a place owned by Maude Anderson, and then——

The Court: She was running it?

Mr. Monagle: And Maude got another woman to run it and arranged to——

The Court: Let the Court Reporter read that testimony.

Court Reporter: "I gave up working for Maude. She had another girl come, and she was going to build me another place of my own, so

when this girl came, I took a trip out. We decided I should make a trip to Seattle."

Mr. Tollefsen: If there is any doubt on it, I would [201] like to be heard further, but the jury should be excused.

The Court: The matter ought to be cleared up right now. Who were you procuring Gloria Bowman for?

A. For Maude Anderson.

The Court: And in the arrangements you made with Gloria Bowman who were you acting for?

A. Maude Anderson.

The Court: At all times?

A. At all times.

The Court: Did you have any interest in Gloria Bowman yourself?

A. No, I didn't.

The Court: The money you advanced her you advanced for Maude Anderson?

A. Yes.

The Court: Under a previous arrangement with her?

A. Yes.

The Court: Go ahead.

Q. What arrangement did you make, if any, with Gloria Bowman for repayment of the \$70.00?

A. She was to pay it back to Maude.

Mr. Monagle: We would like an exception. If the conversation took place in Seattle——

The Court: I understand that. If she was acting as agent for the defendant here, it would be admissible, certainly.

Mr. Monagle: We would like an exception, for the reason that there is no agency and no foundation has been laid, and anything said in Seattle is not binding on the defendant, and for the further reason that the witness [202] on the stand admitted being an accomplice in the deal, and that any testimony down there is incompetent, irrelevant and immaterial.

The Court: There is no objection that I know of as a basis for your exception.

Mr. Monagle: The Court ruled she could answer the question. We object to her answering the question on those grounds I stated.

The Court: Objection be denied.

Mr. Monagle: Exception.

The Court: It will be allowed. Go ahead.

Q. Subsequent to your advancing this money to Gloria Bowman, do you know what she did?

A. Yes.

Q. What?

A. She worked as a prostitute.

Mr. Monagle: We object to that as hearsay. It would be entirely hearsay as to what Gloria Bowman did.

Mr. Tollefsen: If the Court please, I asked if she knew and she said she did.

The Court: It wouldn't be hearsay if she knew.

Q. What did she do after you gave her this money?

A. She went and bought a ticket and came back and showed me the ticket.

Q. What boat did she leave on?



A. The North Coast. The same one I went down on.

Mr. Monagle: We ask for an exception to all these questions as being incompetent, irrelevant and immaterial and not binding on the defendant—the defendant wasn't there. [203]

Mr. Tollefsen: If the Court please, there is no conversation involved in this line of questioning—

Mr. Monagle: If an exception isn't good on any other ground, it isn't primary evidence. Gloria Bowman is the best witness as to what she did.

The Court: She can testify to what she knows in carrying out the arrangement she claims to have made.

Mr. Monagle: We object on the ground that the witness performed acts for her, and that is the best evidence of fact.

The Court: That is not necessarily the only evidence. The witness may answer if she knows. She says she knows, and I assume she is testifying from personal knowledge. If she is, it is admissible.

Q. Did you state what boat she left on?

A. She left on the North Coast.

## II.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Marguerite Miller, namely:

Q. Did you do anything else about procuring girls for Maude?

A. Yes. I got her two more girls.

Mr. Monagle: That is immaterial. She is not accused of bringing anyone but Gloria Bowman.

Mr. Tollefsen: If the Court has any doubt on that point, I would like to be heard in the absence of the jury.

The Court: Do you want to press that point?

Mr. Monagle: Yes, your Honor.

The Court: The jury will be excused until called.

(Whereupon the Court admonished the jury, and the jury retired to the Jury Room.) [204]

The Court: I will save time by stating that I think this testimony is admissible if she did secure two other girls in pursuance of the same arrangement, on the same trip. If you have authorities to the contrary, I would like to see them.

Mr. Monagle: My position on that line of questioning is that anything else she did is purely prejudicial—as to any other girls. The defendant is only accused in the indictment of bringing one girl up. If she brought some other girls, whether she is indicted for it or not, our client isn't. It is prejudicial to the jury.

Mr. Tollefsen: If the Court please, it naturally goes to the intent, motive and plan by showing other actions of the same type and character. We will introduce in evidence a communication with reference to the other two girls, as well as Gloria Bowman. It is necessary the evidence be introduced, to show the other two girls were being pro-

cured, in order that the documentary evidence will make sense regarding the same transaction.

The Court: Read the question asked just before this discussion started.

Court Reporter: "Did you do anything else about procuring girls for Maude?"

Mr. Tollefsen: Any acts we show whereby she procured any girls in Seattle for Maude Anderson indicates and substantiates the arrangement with Maude, that she was acting as agent in procuring these girls; not to convict her for bringing up any other girls she might have brought up; but to substantiate and indicate the plan [205] under which——

The Court: A general course of conduct.

Mr. Monagle: A general course of conduct as to other girls doesn't substantiate this. If the District Attorney is attempting to prove conspiracy, that is different.

The Court: It doesn't charge any.

Mr. Monagle: We submit there isn't any, if it please the Court.

The Court: I think the fact should be established clearly and conclusively that the procuring of these other two girls, if they were procured of course, was made pursuant to general instructions—not general instructions, but pursuant to the instructions from the defendant and was part of her mission down below, in other words part of a general plan.

Mr. Tollefsen: (To Court Reporter) Would you read that question back again?

The Court: Wait until the jury comes before asking any additional questions. Call the jury.

(Whereupon the jury returned to Jury Box.)

Q. I will withdraw the last question. I will ask you, if while you were in Seattle, you did anything else toward procuring girls for Maude Anderson, in accordance with your arrangement with her?

A. I got two girls.

Mr. Monagle: We object on the ground that it is not binding on the defendant and is incompetent, irrelevant and immaterial. [206]

The Court: It would be better to ask if the arrangement with the defendant was to get other girls, or how many girls, or what the arrangement was.

Q. Will you state again what the arrangement was about getting girls and how many?

Mr. Monagle: When and where, and what arrangements were made?

Mr. Tollefsen: I am asking the question.

Mr. Monagle: I would like to know where and when—I might object—Sitka or Alaska—where was the arrangement made?

Q. You previously made an arrangement in Sitka? A. Yes.

Q. Prior to your departure for Seattle?

A. Yes.

Q. At that time and place what arrangement did you have with Maude?

A. That I should bring three girls and, if I

could get another that was real good, to bring her.

Q. How many?

A. Three for sure, and if possible to get another because she would like to replace one she had, and put her in the place, but three any way.

Q. Pursuant to that arrangement did you do anything else in Seattle about getting girls, other than what you testified to regarding Gloria Bowman?

A. Yes. I got two more girls.

Mr. Monagle: Answer "yes" or "no".

The Court: Address your remarks to the Court.

Mr. Monagle: I don't have a chance to interpose my objections. [207]

The Court: She said that she did get two other girls.

Mr. Monagle: I move to strike the answer. She was asked if she did, not what she did. I move to strike the answer.

Mr. Robertson: If she would answer "yes" or "no", we would have a chance to object.

The Court: I don't think the witness understood the question. That answer was responsive to it. Objection denied.

Mr. Monagle: We will take an exception.

Q. What arrangement did you make with these other two girls?

Mr. Monagle: We object to that on the same grounds stated—incompetent, irrelevant and immaterial, and not binding on the defendant.

The Court: Overruled.

Mr. Monagle: We will take an exception. It will save time if we except to all questions of con-



versation and arrangements with any other person than the defendant here and Gloria Bowman, who she is charged with bringing up. If the Court will allow an exception to all questions and answers, it will save interrupting.

The Court: That is pretty broad. I am admitting this testimony as to any others than Gloria Bowman on the theory that it establishes a general course of conduct.

Mr. Monagle: Our objection is based on the ground that the defendant is not charged with a general course of conduct but with bringing Gloria Bowman up.

The Court: There is no crime of general course of conduct that I know of. Go ahead.

Mr. Tollefsen: (To Court Reporter) Will you read the [208] question back.

Mr. Monagle: Will the Court give us an exception to that question?

The Court: I can't rule on an exception of that kind.

Court Reporter: "What arrangement did you make with these other two girls?"

A. I made arrangements to have them come here by plane—to Sitka by plane—and advanced them the fare, the same as I did the other girl.

### III.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Marguerite Miller, namely:

Q. Did you advise Maude Anderson you had procured these three girls?      A. Yes.

Q. By what form of communication?

A. Telegraph and code message.

Q. Do you recall what was said in that message?

Mr. Monagle: We object, if the Court please. If a telegram was sent, and she said one was, the telegram is the best evidence.

The Court: It is if you have it.

Mr. Tollefsen: If the Court please, this telegram was sent to the defendant. Consequently it was not in the possession of this witness. We have the telegram but it was obtained by another witness. I want this witness to testify to what she sent so it can be identified when it is introduced in evidence.

The Court: If it is her telegram, she can identify it.

Mr. Tollefsen: Then I will ask the Court to let me withdraw this witness and call the witness who has it, and then—— [209]

The Court: Can't you show her this telegram and have her identify it as the message she sent—not on the same paper, but the identical message?

Mr. Monagle: If it is the same message she sent, anything she sent is not binding on the defendant.

The Court: As to the telegram——

Mr. Monagle: Anyone could send you a telegram but it would not be binding on you, would it?

The Court: We are wasting time, under the circumstances, as your client ought to know whether the telegram was sent to her.

Mr. Monagle: I haven't seen it, but I don't like it in the record.

Mr. Robertson: They should produce it and let us look at it.

The Court: You are entitled to before it is introduced.

Mr. Tollefsen: I will ask that the telegram be marked for identification, and I will show it to this witness and a subsequent witness, and show it is the same telegram that was obtained by the subsequent witness. I would like to have it marked so the record will show it is the same telegram being testified to by both witnesses.

The Court: It may be marked for identification.

(Whereupon the telegram, which was subsequently received in evidence as plaintiff's Exhibit No. 1, was marked plaintiff's Exhibit No. "A" for identification.)

Q. I will show you Plaintiff's Exhibit "A" for Identification and ask if that is the telegram which you sent?

The Court: To the defendant Maude Anderson.

Q. To the defendant Maude Anderson, regarding these three girls?

Mr. Monagle: May it please the Court, let the witness be instructed to answer "yes" or "no" to that question. [210]

The Court: That is what she is asked.

Q. Is that the telegram you sent?

A. Yes; that is the same message any way.

IV.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Marguerite Miller, namely:

Q. I will withdraw that. Did you receive a letter from the defendant regarding those girls?

A. Yes.

Q. Where is that letter?

A. I haven't got it. I destroyed it.

Q. Will you state what the letter contained?  
It has been established the letter was destroyed.

Mr. Monagle: May it please the Court, I think the question should be more definite as to when the letter was dated, when it was received, and where it was sent from. She testified the letter was destroyed. Under the rules of private rights, we have the right to know who it came from, and when, and it must be authenticated.

The Court: She said it was from the defendant Maude Anderson. About when did you receive this letter?

A. I received it when I was in Los Angeles, shortly after the [211] War was declared. That would be along——

The Court: Before or after you sent the girls up here?

A. After—that I received the letter.

The Court: Did it have to do with the sending of these girls up here?

A. Yes.

The Court: How?

A. Yes, it did.

Q. What did the letter say?

Mr. Monagle: We object, may it please the Court, on the grounds that it is not binding on the defendant, is not substantiated or authenticated, and is something that happened after the date of the defendant's being accused of committing the crime, and wouldn't be binding on her.

The Court: Certainly her own writing should be binding on her. The witness testified she had a letter from her shortly after War was declared, and in relation to this girl transaction.

Mr. Monagle: We have a right to know whether it was written by Maude or typewritten.

The Court: Maybe your client has a copy of it.

Mr. Robertson: We take exception to the Court's insinuation from the Court's own mouth.

The Court: The Court doesn't mean to convey such an impression. The line of objection is such that I am trying to find out what counsel does want any way.

Mr. Monagle: The only thing we want is to limit the proof to what defendant is charged with. He can't go a year after or two years behind. She isn't giving any date when it was received in Los Angeles. [212]

The Court: I beg your pardon. She said it was about the time War was declared. She said she was in Los Angeles, and this letter she received, as I understand it, was received there about the time War was declared. Is that what you said?

A. Yes, right afterwards.



The Court: It is a matter of general knowledge when War was declared.

Mr. Monagle: It is at least forty days after the date she is charged with the crime—well, it is two weeks after she testified she sent the girl up, on the same boat she went down on, and she left the last part of November.

The Court: I asked her if it had to do with this same transaction, this girl transaction. If it is, it is admissible.

Mr. Monagle: The only thing is how can she “aid and assist” after the girl is in Sitka, by her own testimony.

Mr. Jernberg: If the Court please, we believe we are pretty well supplied with authorities. If the jury will be excused, I would like to convince Mr. Monagle.

The Court: The Court is convinced already.

Q. Will you state what that letter contained?

Mr. Monagle: We object to all testimony about this letter on the grounds that it is not authentic and there is no proof as to the date or time and it is incompetent, irrelevant and immaterial and self-serving on the part of the witness.

The Court: Answer the question. Read the question.

Court Reporter: “Will you state what that letter contained?” [213]

A. In that letter Maude said the two girls hadn't shown up and she didn't know where they were. She was talking about the girls, the houses, and since the War was on they were having black-

outs and that business was bad and she might have to close. She said she decided not to build on to her mother's home for me.

Q. Did she state anything in that letter about Gloria Virginia Bowman?

A. Yes. She said one girl had arrived by boat, but those on the plane didn't.

V.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Marguerite Miller, namely:

Q. You were asked whether the two girls, Diana Crawford and Maxine, were going on the plane to Sitka. I will ask you what arrangement you made with them in Sitka for them to go to Sitka—in Seattle?

Mr. Robertson: We object on the grounds that it is incompetent, immaterial, irrelevant and not binding on the defendant, and it is not in proof of the accusation against the defendant.

The Court: The Court has already ruled on that. It sounds to me like repetition.

Mr. Robertson: We would like an exception.

Mr. Tollefsen: It might be a repetition but it is to clear up a question on Cross Examination.

Q. I will ask you what arrangement you made with Diana Crawford and Maxine in Seattle for their transportation to Sitka?

A. I made—— [214]

Mr. Robertson: We ask to be allowed the same exception.

A. I made arrangements for them to go by plane.

Q. And how much money did you advance to them?

A. I gave one 140 some dollars and the other 120 some.

VI.

The Court erred in admitting in evidence over defendant's objection Plaintiff's Exhibit No. 1, which reads as follows:

"Alaska Communication System,  
Signal Corps, United States Army.  
Received at 26 WXA B 14 WU  
Seattle, Wash., Nov. 29, 1941, 5:03 a. m.  
Maude Anderson, Lake View Cottage, Sitka.

Airmail two dresses today send coat on North Coast need the three badly. Marg."

VII.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Elvira Cavender, namely:

Q. What sort of financial arrangements were made by you with Mrs. Anderson while you were working there?

Mr. Monagle: We object on the grounds that it is incompetent, immaterial and irrelevant. The defendant is not accused of bringing this witness to Sitka, as I understand it.

The Court: She may answer.

Mr. Monagle: We take an exception.

Mr. Tollefsen: Read the question please.

Court Reporter: "What sort of financial arrangements were made by you with Mrs. Anderson while you were working there?" [215]

A. What do you mean? Do you mean was that my transportation up there?

Q. I am referring to how much you paid for staying there or how much you were paid for working.

A. I paid room and board by the day, and of course there was a certain amount to be given her from each working. A certain amount is taken out of the money we made throughout the day. A certain amount is given to the landlady and we were allowed to keep the rest, and we paid room and board by the day.

### VIII.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Elvira Cavender, namely:

Q. To what were they referring when they were talking about this code?

A. Well, it meant girls to bring up to Sitka.

Mr. Robertson: We object on the grounds that it is incompetent, and immaterial what was meant. I move to strike——

The Court: She can tell what was meant, if she knows.

Mr. Robertson: The objection is to what they meant. She didn't say what they said in the meantime. I move the answer be stricken.

The Court: I think it is responsive to the question. What did they mean?

Mr. Tollefsen: I will restate the question.

Mr. Robertson: The answer would be mere conjecture on the part of the witness.

The Court: It wouldn't be, if she knew. [216]

Mr. Robertson: She didn't testify if she knew.

The Court: That is what she was asked.

Mr. Robertson: I still object. We take an exception.

The Court: Go ahead with the examination.

Q. Do you know what was meant when they were talking about the code? A. Yes.

Q. What did they say?

A. It was girls. I heard the word "girl" mentioned. I heard it.

## IX.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Gloria Virginia Knapp Bowman, namely:

Q. What were the circumstances under which you met her?

Mr. Robertson: We object on the ground that it is incompetent, irrelevant and immaterial, and not binding on the defendant.

The Court: She may answer.

Mr. Robertson: Exception.

A. Well, I was brought to the hotel by Billy Day, and she was there.

Q. What transpired at that time?

A. She asked me if I wanted to go to Alaska.



Mr. Robertson: I will renew my objection on the grounds that it is incompetent, immaterial and irrelevant, and transpired in the absence of the defendant.

The Court: Answer the question.

Mr. Robertson: Exception.

A. She gave me \$70.00, and I bought a ticket on the North Coast to Sitka, Alaska, and left the next day for Sitka. [217]

### X.

The Court erred in receiving in evidence over defendant's objection the evidence of the witness Gloria Virginia Knapp Bowman, namely:

Q. What financial arrangement was there between you and Maude, if any, during the time you practiced prostitution in her house?

Mr. Robertson: We object on the grounds that it is incompetent, immaterial and irrelevant, and not proof of the charge.

The Court: Answer the question.

Mr. Robertson: Exception.

A. Down in Seattle I received \$70.00 or close to it from Margie Miller and I was supposed to pay Maude Anderson.

Mr. Robertson: We object.

The Court: That is not responsive.

Q. What financial arrangements were there with regard to your working for Maude?

A. Two dollars a day for board and room, and a third of what I made.

## XI.

The Court erred in admitting in evidence over defendant's objection Plaintiff's Exhibit No. 2, which is a ship's manifest of the Steamer North Coast, Voyage No. 68 North, arriving in Juneau December 3, 1941, and showing the name of one, "Miss Jean La Rue".

## XII.

The Court erred in denying defendant's motion, made at the conclusion of plaintiff's case in chief, namely: [218]

Mr. Robertson: The defendant now moves to strike all the testimony of the witness Margie Miller, relative to the alleged conversation between herself and the defendant in Sitka, and also to her transactions, dealings and conversations with Jean La Rue or Bowman, and other persons in Seattle, upon the ground that whether or not Margie Miller is produced as a witness and gave her testimony on the theory that she was an agent of the defendant or an accomplice of the defendant, that there is no corroborating evidence to sustain her testimony, and that under the law as to agency the declarations of an agent, to which she claims she is making them, or acts done on behalf of a principal, unless there is an admission of the principal to the existence of a relationship of principal and agent by the principal, or else that there is other competent proof than the evidence offered by the agent, and that she be treated as an accomplice. "A conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect

the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission." Section 5352, Compiled Laws of Alaska, 1933. And the principle of agency is in 22 Corpus Juris at Page 376. We submit at this time that there is no such corroborating evidence, that the only possible evidence that there is is circumstantial evidence and the circumstantial evidence is very slight, if of any weight whatsoever; that Jean La Rue testified that it was fifteen minutes after she had [219] entered this house in Sitka before she talked to Mrs. Anderson, and the only way she sought to tie Mrs. Anderson up with Margie Miller was by saying that Mrs. Anderson said in substance, as I recall her testimony, "Oh, are you the new girl who has come from Seattle?" There is no evidence whatsoever as to what that meant—even though it now stands admitted that if Mrs. Anderson did make such a statement, it hasn't been corroborated—or that the source of that information couldn't have been ascertained by Mrs. Anderson other than from the fact of a dealing between herself and Margie Miller. Furthermore, Jean La Rue herself says when she left this house about a month after she had been in it, up to that time Mrs. Anderson had never asked her to pay any transportation, then she claims a month later more than a month, probably six weeks after the alleged commission of the crime, that Mrs. Anderson asked her to make refund of this \$70.00. She made no statement in her evidence as to why or the reason, if any, Mrs. Anderson assigned as to

why, but just said in substance that she wanted her to repay \$70.00 which Margie Miller advanced for her transportation from Seattle. The other woman, Jackie Lugo,—her only testimony is testimony that she entered the private bedroom of Mrs. Anderson for two minutes and while there she heard them—Mrs. Anderson and Margie Miller—talking about arranging some kind of code and understood it was something about girls. That was the only positive evidence she gave. The telegram itself is no evidence and none was brought in, except by inference, as to why that telegram couldn't mean exactly as to what it reads. There [220] is no evidence that Mrs. Anderson ever saw that telegram or had that telegram, except that Mr. Mansfield testified he and Mr. Whitmore found it, if I understand correctly, inside a Valentine box or Valentine envelope, I took it, in a bureau drawer of some dressing table or something of that kind, in one of the rooms in Mrs. Anderson's house, and I submit to your Honor, that is not the kind of evidence required to corroborate an agent or accomplice, before the principal can be convicted of an alleged commission of a crime in which the agent was principally acting, and I think the Court will take judicial notice that the agent has plead guilty before this Court, that she committed the crime of furnishing the transportation, your Honor.

### XIII.

The Court erred in refusing to admit the evidence of the defendant Maude Anderson as set forth in her offer of proof, namely:

Mr. Robertson: I made my offer. I think Miss



Maynard has got it but I will restate it. The defendant offers to prove by herself that in this conversation between herself and Margie Miller in the fall of 1941, shortly before Thanksgiving and shortly before the time that Margie Miller left Sitka and went to Seattle, and in her bedroom in this house that she was then living in in Sitka, she and Margie Miller being present, that arrangements were made by which this defendant agreed she would have Clarence Rands build a house for this Margie Miller, and this Margie Miller then and there told defendant that she wanted the house for the purpose of having a house of prostitution of her own, and we offer to make proof by this witness. [221]

#### XIV.

The Court erred in refusing to admit the evidence of the defendant Maude Anderson as set forth in her offer of proof, namely:

Mr. Monagle: May it please the Court, for the record, we offer to adduce evidence by the witness on the stand and by other witnesses as to the physical and mental condition of the defendant at the time the alleged crime was committed and at the time Jackie Lugo Cavender claims she went in the room to get change when Margie Miller was there and she heard some conversation about a code with reference to bringing girls up here.

The Court: Do you claim she was incompetent?

Mr. Monagle: No, not mentally, but that she was taking shots, and I might submit to the Court the reason why we [222] want to adduce the evidence.



Margie Miller testified that Maude Anderson was in bed when she talked to her about the code. Jackie Lugo Cavender testified that Maude was not in bed but was sitting up. Also we offer to submit proof by this witness on the stand and others that during the time that Margie Miller testified, or during the time that Jackie Lugo testified she went in to get change from Maude Anderson that Margie Miller herself was personally managing the house of prostitution, handling all the cash, and making all of the change, and that Jackie Lugo's testimony is false when she testified she went into that room to get change from Maude Anderson and that she got change from Maude Anderson.

The Court: If she says that is the truth, she can testify to it. I don't recall any such testimony as that.

Mr. Monagle: Jackie Lugo testified to it on the stand, that that is why she went in the room and was only in there two minutes, and she went in to get change.

Mr. Robertson: From Mrs. Anderson, and was in there two minutes and heard—

The Court: She said they were talking—

Mr. Monagle: She was asked and she answered, "I went in there—"

The Court: And that they were both in there—

Mr. Monagle: I mean to prove by these witnesses that is purely a fictitious story, unless there is some other reason. Her reason was to get change.

The Court: What do you mean? That she didn't go in to get change?

Mr. Monagle: And that she was not even in there. The [223] defendant testified she never had any conversation when Jackie Lugo was present.

The Court: You asked her about that already.

Mr. Monagle: All right, but it certainly impeaches Jackie Lugo's testimony.

The Court: We are not going into it any further.

Mr. Robertson: I don't know how far we can go about stating her general condition. For the record, we will state what we are going to show her physical condition is.

Mr. Monagle: May it please the Court, we can show by this witness and by competent other witnesses, and we can tender proof that Maude Anderson suffered a nervous breakdown shortly prior to this, within a few months, and was in very poor mental condition, that she was suffering from arthritis, heart trouble and asthma, during the time, and was under the doctor's care and is still under the doctor's care for these ailments, and that she was in great pain and under the influence of medicine.

The Court: In other words, she didn't know what she was doing at any time?

Mr. Monagle: No, that is not the inference.

The Court: It certainly would be the inference.

Mr. Monagle: I don't mean——

The Court: That in a condition like that, she didn't know and does not now——?

Mr. Monagle: A person in great pain is—like when they came in to arrest her and the F.B.I. Agent had her sign papers. She was in no condition—if the doctor had been there he would not have permitted

them to talk to her— [224] to arrest her and that was all. I can prove it by the doctor.

The Court: That would just open an avenue of investigation—we would never get through with this.

Mr. Monagle: It is important to the defendant, may it please the Court.

The Court: I can't anticipate these things.

Mr. Monagle: I realize that.

The Court: I am not passing in advance until I know what they are going to develop.

Mr. Robertson: We understood the Court consistently ruled that we can't show anything about illness. That is why we make the offer of proof. Mike (Mr. Monagle) asked her several times and invariably the Court ruled it out. We make the offer of proof to protect our record.

The Court: I don't think that has anything to do with it, unless she was incompetent and didn't know what was going on.

Mr. Robertson: That is why we make the offer of proof. The Court ruled it out.

Mr. Jernberg: What is the offer of proof for? When Mr. Mansfield was there?

Mr. Monagle: Definitely and when Margie Miller was there.

The Court: Are you claiming it was an illegal search?

Mr. Robertson: Yes.

The Court: As to her physical condition—she talked to the contractor about building her house

and she was certainly able to look after any other matters. She even had him make plans.

Mr. Monagle: Well, I could go into that. [225]

The Court: It was right at the time we are talking about.

Mr. Monagle: I could go into that more fully, but the Court wouldn't let me.

The Court: You have gone into it more fully already.

Mr. Robertson: We take exception to the Court's ruling.

(Respective attorneys and Court Reporter left the Bench and were again within hearing of Jury.)

## XV.

The Court erred in refusing to admit the evidence of the defendant Maude Anderson as set forth in her offer of proof, namely:

Mr. Monagle: We offer to prove by this witness on the stand and by other witnesses that Margie Miller came back to Sitka, intending to start her own place of prostitution in a building leased from Maude Anderson, in January, 1942, and had transported Gloria Bowman to Sitka with the intent of having said Gloria Bowman work in said Margie Miller's house of prostitution, and that when Margie Miller returned to Sitka from Seattle in January, 1942, she was quite angry because a building was not ready so she could start her own house of prostitution, and stated in the presence of Lou Dixon Northrup and Irene Holmquist that she would get even

with Maude Anderson if it took her the rest of her life.

## XVI.

The Court erred in refusing to continue the trial over until the arrival of defendant's witnesses Lou Dixon Northrup and Irene Holmquist and in denying defendant's motion, namely: [226]

Mr. Monagle: We have two witnesses who are subpoenaed to be here, and we have arranged for their transportation by airplane. It has been impossible to get them here. The case was set for trial next Wednesday, and it is no fault of the defendant they weren't here or subpoenaed at an earlier date. We offered to charter a plane, but it hasn't been physically possible to get them here. The airplane company advised me that they would get them here this afternoon if it is possible to get to Sitka and Lena Bay.

Mr. Jernberg: Mr. Rands was here. We object to a continuance. These witnesses reside at Sitka too.

The Court: I don't understand your asking for a continuance.

Mr. Monagle: We are asking for the right to put on our rebuttal testimony.

Mr. Jernberg: Are you resting at this time?

Mr. Monagle: No. We have two witnesses. Both of the District Attorneys know why Mr. Rands was here. \* \* \* It wasn't our purpose, and isn't our purpose to delay this trial, but the Court knows there was a case went by the board—the defendant



plead guilty—which it was anticipated would be on trial at this present moment. Naturally we didn't subpoena our witnesses who we expected to get. The Government subpoenaed Mr. Rands for the 3rd of April. He was subpoenaed as their witness. He was found favorable to us and unfavorable to them, so I subpoenaed him.

The Court: What about the other witnesses?

Mr. Monagle: The subpoenas are issued and served. [227]

The Court: Have they been subpoenaed?

Mr. Monagle: Yes.

The Court: When?

Mr. Monagle: Day before yesterday. They answered by wire that they would be here as soon as physically possible. They were subpoenaed as soon as we knew this case was on trial. The subpoenas were sent by wire. It was the only physically possible thing we could do. If we had known, we could have got them over here Monday, but no planes flew over here yesterday whatever. I have checked with the airplane company—last night late and also this morning—they thought about two or three they might get over this afternoon.

The Court: I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court.

Mr. Monagle: The calendar was only just set. The other case was set first. We didn't know—the defendant can't afford to bring witnesses weeks ahead like the Government.

The Court: It is just as much to the interest of the defendant to get her witnesses here as the Government.

Mr. Monagle: I don't mind a week ahead. We anticipated that.

The Court: We are not going to wait on them. In any event, if they get here today, or in the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account. Has the Government any rebuttal?

Mr. Jernberg: No, your Honor. The defendant hasn't rested. [228]

Mr. Robertson: The defendant hasn't rested, and we don't intend to rest until they get here. If the Court says we have to, we will make an offer of proof what the witnesses will testify.

Mr. Jernberg: I didn't mean to be repetitious and annoy Mr. Robertson, but the Court asked me if I had any rebuttal, and we don't have to put on any rebuttal until the defense rests, as I understand my procedure, Mr. Robertson.

The Court: There is nothing in the file to indicate that any witnesses have been subpoenaed by the defendant, other than the witness Rands.

The Clerk: There is in the office. It was just returned this morning.

The Court: Well, bring it in.

Mr. Monagle: May it please the Court, we will file with the Court a wire from one of the witnesses to the effect that they will be here as soon as physically possible.

Mr. Robertson: They tried to get an airplane

out yesterday, but because of this Taku wind they couldn't get out. We are not trying to delay the Court. \* \* \*

Mr. Monagle: Both witnesses are subpoenaed.  
\* \* \*

Mr. Robertson: The subpoenas were wired to Sitka for the deputy to make service. I wouldn't think they had been returned. As a matter of fact, I think the Sitka deputy would make the return.

The Court: The Clerk ought to have some record of it, if any subpoena was issued. Subpoenas are issued by the Clerk. They certainly would have a record in the Clerk's Office. [229]

The Clerk: They were issued, your Honor, for Sitka, but there hasn't been a return on them.

The Court: Look into it. In the meantime Court will stand adjourned until 2:00 o'clock.

(Whereupon Court recessed until 2:00 o'clock P. M. April 6, 1945, reconvening as per recess, with all parties present as heretofore and the Jury in the box; whereupon the following took place:)

The Court: You may proceed.

Mr. Monagle: May it please the Court, the two witnesses I informed the Court about prior to adjournment at noon have not arrived. I checked with the airplane company a few minutes ago.

The Court: Well, we will have to proceed.

Mr. Monagle: In that case I would like to make an offer of what the two absent witnesses would testify to. \* \* \* May it please the Court, we move

at this time that the case be continued until the arrival of Lou Dixon Northrup and Irene Holmquist from Sitka. These two witnesses were subpoenaed as soon as the defense knew that the case would be on for trial—that is day before yesterday—and they would have been here if it was possible for an airplane to get to Sitka and bring them here. They were prevented, the plane was prevented from going for and bringing them because of the Taku wind that was blowing yesterday and today. There is no other means of transportation that would get them here in less than sixteen hours, except an airplane. It is physically impossible for them to get here. It has been physically impossible for them to get here by any means of transportation since they were subpoenaed. [230] This case was originally set for next Wednesday for trial and was moved up because in another case the defendant plead guilty and the case did not go to trial. The witnesses could have arrived here on a regular steamer, on the Northland, bringing them back to Juneau Monday. They would have arrived here not later than next Monday night, which would have been twenty-four hours.—

The Court: You mean last Monday?

Mr. Monagle: No. The Northland went yesterday to Sitka. Had the case come up on the date regularly set for it, they would have been here by Monday and the witnesses would have been here.

## XVII.

The Court erred in refusing to admit in evidence



the evidence of defendant's witnesses Lou Dixon Northrup and Irene Holmquist as set forth in defendant's offer of proof, namely:

Mr. Monagle: We offer to prove by these two witnesses that Margie Miller informed them that she intended to set up her own private house of prostitution and obtain girls to work therein, and that Maude Anderson was going to do some work on and enlarge a building so that Margie Miller could use it for a house of prostitution; and we offer to prove by these two witnesses the further fact that when Margie Miller returned to Sitka, Alaska, from the States some time during the month of January, 1942, she stated, in substance, to each of these witnesses that she would get even with Maude Anderson for not building this house of prostitution for her in accordance with their agreement if it took her the rest of her life. I [231] might inform the Court that the witness Irene Holmquist is a reputable housewife and has never been a prostitute or connected with prostitution in any way, to the best of our knowledge, and, I believe, has no criminal record of any kind. The witness Lou Dixon Northrup has been a prostitute and was present in the Lake View Cottage in Sitka, Alaska, in November, 1941, when Margie Miller was working there and when Margie Miller was managing the operations of said house of prostitution; that in the meantime Lou Dixon Northrup discontinued the practice of prostitution and, to the best of our knowledge, has not been practicing prostitution for a period of many months, and re-



cently owned her own small mercantile store in Sitka, which she personally operated, and at present and for sometime last past has been employed as a laborer in the saw mill of the Columbia Lumber Company in Sitka, Alaska, and is and has been for many months living a reputable life. I would like also to add that the fees of the two witnesses have been advanced and arrangements have been made to pay their airplane fare and any delays and the cost of the charter trip on the airplane, and the only thing preventing the witnesses from being here is the inclement weather.

### XVIII.

The Court erred in denying defendant's motion to instruct the jury to return a verdict of not guilty, namely:

Mr. Robertson: We have nothing further. We move the Court to instruct the Jury to return a verdict of not guilty against the defendant on the grounds that the [232] Government entirely failed to make out a case. I rest this on—I am willing to rest this motion on this single point, your Honor—the indictment charges that on the 25th day of November, 1941, at Sitka, Alaska, and within the jurisdiction of this Court, defendant “did, wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to wit: Gloria Virginia Knapp Bowman, alias Jean La

Rue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States and the Territory of Alaska.” I make my point entirely upon the fact—“transport and cause to be transported and aid and assist in obtaining transportation.” I submit to your Honor for one to transport another or cause to be transported for immoral purposes, contrary to this statute, that either the defendant must personally transport or must do some actual thing that causes the other to be transported, and that to aid and assist, aid means to help, assist means to help, and that, so far as I have been able to find, there are no decisions on that particular point, but I submit in this case that there isn’t a single iota of evidence that this defendant transported this girl Jean La Rue, that she caused her to be transported, supplied any means that caused her to be transported, or that she aided, that is that she supplied any means which helped to transport that girl from [233] Seattle to Sitka. I submit, your Honor, even at this time for the purpose of this motion, assuming the woman Margie Miller’s story is correct that the defendant promised and agreed that she would repay her for such money as she expended in transporting that girl from Seattle to Sitka, that as a matter of fact a promise and agreement is not either transportation or aid in transportation, unless the promise or agreement is complied with by the accused having actually furnished or

paid part of the means by which she was transported.

The Court: I don't agree.

Mr. Robertson: I don't suppose you would.

The Court: I mean the point you just mentioned, and that she had actually to pay it.

Mr. Robertson: I don't say she actually had to pay the money, but she has to actually supply or help to supply the means by which she is transported, and there isn't a single bit of evidence in this case other than the promise—Margie Miller's statement that she promised and agreed that she was going to. There is no evidence which warrants this case going to the Jury, that she ever did promise and agree, and there is no outside evidence to corroborate her either as an accomplice or an agent. The only evidence I can see is this girl Jackie Lugo who ran in the room for two minutes and heard them talking about a code. There is no other independent evidence. Certainly a telegram by one person to another—that telegram is the alleged agent's verbiage, not the defendant's verbiage at all. There is no evidence at all to take this case to the Jury against this woman at this time. [234]

## XIX.

The Court erred in giving its Instruction No. 5, namely:

### No. 5

In the prosecution of this case the Government relies to some extent upon the testimony of Mar-

guerite Miller. Marguerite Miller is admittedly an accomplice in the crime charged against the defendant.

“Accomplices” are defined as all persons who participate in an offense as principals, and “principals” as all persons acting together in the commission of an offense.

Our statute provides:

“Section 5044, Compiled Laws of Alaska, 1933.—Principals, Who Deemed Such. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such.”

You are, therefore, instructed that, if you believe from all the evidence in this case beyond a reasonable doubt that the defendant Maude Anderson was concerned in the commission of the crime charged or aided or abetted in its commission, though not present, and whether she directly committed the act constituting the crime or merely aided or abetted in its commission, though not present, you may find her guilty as a principal.

To which defendant then and there and prior to the retirement of the jury objected, namely:

Mr. Robertson: The defendant takes exception to Court's Instruction No. 5, page 6, and calls the Court's attention to the fact that the language, in the defendant's opinion, puts a burden upon the



defendant as though it was admitted in the case that she is an accomplice, [235] whereas the only admission, by our view, is the admission of Margie Miller that she is an accomplice. I submit the burden is upon the Government to prove that the defendant is an accomplice of Margie Miller.

## XX.

The Court erred in giving its Instruction No. 6, namely:

### No. 6

You are instructed that our law also provides: Section 5352, Compiled Laws of Alaska, 1933.

“Sec. 5352. Testimony of Accomplice Must Be Corroborated. A conviction can not be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission.”

In this connection I instruct you that the witness Marguerite Miller is what is known in law as an accomplice, and I further instruct you that the corroboration required by the statute is corroboration of the accomplice's testimony to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission. It is not necessary, however, that the defendant be present at the time the arrangements were perfected pursuant



to which Jean La Rue came to Sitka, if you believe such arrangements were made, or that the defendant paid her transportation or any part thereof. It is sufficient if she agreed with or directed the witness Marguerite Miller that she, the said Marguerite Miller, should procure a girl or girls for her to be transported in interstate commerce for the purpose of prostitution or other immoral purposes, or agreed to pay such girl's transportation or other expenses in connection therewith, and that pursuant to such agreement or directions that the witness Marguerite Miller procured the girl Jean La Rue to [236] come from Seattle, Washington, to Sitka, Alaska, for the defendant, for the purpose of prostitution or other immoral purposes and that defendant agreed to reimburse or pay the witness Marguerite Miller for said girl's transportation or expenses or any part thereof. (Page 7.)

I further instruct you that in considering the guilt or innocence of the defendant you may take into consideration all of the facts and circumstances tending to connect the defendant with the commission of the crime charged, as well as that above mentioned, and if, after a full and fair consideration thereof, you find beyond a reasonable doubt that the defendant did commit the crime charged or aided or abetted or assisted in its commission, at the time and in any of the ways or manners charged in the indictment, then you will find the defendant guilty as charged. If you do not so find, you will find the defendant not guilty. (Page 8.)

To which defendant then and there and prior to the retirement of the jury objected, namely:

Mr. Robertson: We also take exception to the Court's Instruction No. 6. In that connection I call attention to Defendant's Requested Instruction 5 and 6 and the Requested Instruction I handed the Court yesterday. We feel in that that the Court's instruction does not bring out the fact that the statute requires that the corroborated evidence of an accomplice must go further than simply tending to connect the defendant with the commission of a crime. It isn't sufficient if it merely shows the commission of the crime or the circumstances of the [237] commission of the crime, and it seems to us that the Court's language, particularly in lines 8 to 15 on page 7 of Instruction No. 6, does not thoroughly bring out that fact or that statute. We also except to lines 14 to 32 on page 7 of Instruction No. 6, because we contend that is contrary to the law, that the defendant must have actually done something other than making an agreement or a promise, that she must have either actually caused the transportation or supplied means to aid or help in the transportation, as we tried to set forth in the Requested Instruction 1 we filed with the Court yesterday.

## XXI.

The Court erred in refusing to give Defendant's Requested Instruction, namely:

Defendant's Requested Instruction No. —

You are instructed in this case, before you can

find the defendant guilty, you must find beyond a reasonable doubt that the defendant did wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, the witness Gloria Virginia Knapp Bowman alias Jean LaRue from Seattle to Sitka.

And unless you find that the defendant did so transport, cause to be transported, or aid and assist in obtaining transportation for such witness Bowman you must find the defendant not guilty. And you are instructed that to transport or cause to be transported means that the defendant either herself transported or else furnished the means to transport, and that to aid or assist in obtaining transportation means to furnish means [238] which either did or helped to transport such witness Bowman from Seattle to Sitka, and that a promise or agreement by defendant to furnish the means of such transportation, if she did not actually furnish such or any of such means of transportation, does not constitute the defendant guilty of the crime with which she is charged.

## XXII.

The Court erred in refusing to give Defendant's Requested Instruction No. 5, namely:

### Instruction No. 5

You are instructed that acts or declarations, which were done or made by the witness Margerie Miller and which were claimed to be done or made

by her on behalf of the defendant, in any wise connected with the alleged commission of the crime charged in the indictment herein are not to be considered by you in your deliberations unless you find beyond a reasonable doubt from evidence, other than the testimony of said witness Miller, that said witness Miller was the agent of the defendant in doing said acts or making said declarations.

In other words the witness Miller cannot by her own acts or declarations establish herself to have been the agent of the defendant in the alleged commission of said crime because the relation of agency, if any, between the witness Miller and the defendant must be established by affirmative evidence other than the acts, statements or declarations of the witness Miller.

You are therefore instructed that regardless of what acts or declarations the witness Miller admitted she did or made in the commission of said crime, you should not find that she did or made any of them as agent of the defendant unless you first [239] find beyond a reasonable doubt from other evidence than said witness Miller's testimony, as hereinabove instructed, that said witness Miller then and there was the agent of the defendant.

### XXIII.

The Court erred in refusing to give Defendant's Requested Instruction No. 6, namely:

#### Instruction No. 6

The laws of Alaska provide that the testimony



of an accomplice ought to be viewed with distrust and that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

You are therefore instructed that you cannot find the defendant guilty of the crime charged in the indictment herein upon the testimony of the witness Miller alone or upon her testimony and other corroborative evidence which tends, if you so find, to connect the defendant with the commission of said crime but which corroborative evidence merely shows, if you so find, the commission of said alleged crime or the circumstances thereof.

You are further instructed that you must find the defendant not guilty unless you find beyond a reasonable doubt that the witness Miller's testimony, if you find therefrom beyond a reasonable doubt that she and the defendant were accomplices in the commission of the crime charged in the indictment, was corroborated by other evidence and that such other corroborative evidence not only tended to connect the defendant with the commission of the crime charged in the indictment herein but also was [240] of such nature that you find beyond a reasonable doubt that it more than merely shows the commission of said crime or the circumstances thereof.



## XXIV.

The Court erred in receiving and filing herein the jury's verdict finding defendant guilty.

## XXV.

The Court erred in denying defendant's motion for acquittal, namely:

Defendant's Motion for Acquittal

Comes now the defendant and moves that judgment for her acquittal be made and entered herein and renews her certain motion, which she respectfully submits was in substance a motion for acquittal, which she made in open court at the conclusion of the evidence at the trial of the above cause and in which motion she moved that the court direct the jury to return a verdict herein that she was not guilty.

This motion is based upon the records and files herein and within five days after the jury in the above case was discharged and returned its certain verdict herein finding her guilty, which verdict was filed herein on April 9, 1945, and which verdict is contrary to both the law and the evidence.

## XXVI.

The Court erred in denying defendant's motion for judgment notwithstanding the verdict, namely:

Motion for Judgment Notwithstanding the Verdict

Comes now the defendant and respectfully moves that, notwithstanding the verdict of the jury heretofore filed herein [241] on April 9, 1945, Judgment be entered herein discharging the defendant,

upon the ground that said verdict was contrary to both the law and the evidence adduced at said trial.

## XXVII.

The Court erred in denying defendant's motion for a new trial, namely:

### MOTION FOR A NEW TRIAL

Comes now defendant and respectfully moves that she be granted a new trial upon the following grounds, to-wit:

1. Irregularities occurring at said trial and the exercise of abusive discretion by the trial Judge, by which this defendant was prevented from having a fair trial, in that: the Court at the trial refused to grant the defendant time for the arrival of Lou Dixon and Irene Holmquist, who were material witnesses to her defense and who would have impeached the witness Marjorie Miller and shown that the latter had told said Dixon and Holmquist that she, Miller, was aggrieved at defendant and intended to get even with her even though it took all the rest of her, Miller's, life, notwithstanding that subpoenas had been issued for said Dixon and Holmquist and defendant in good faith had arranged to bring them to Juneau to testify at the trial in her defense by airplane, which was the only available means of transportation but which airplane could not go from Juneau to the places where said Dixon and Holmquist were and return them to Juneau because a strong storm, known locally as a

Taku wind, prevailed in Juneau and also in that area of Southeastern Alaska through which said airplane had to travel in order to pick up said witnesses and bring them to Juneau, which said storm prevailed throughout April 5th and 6th, 1945, on which days [242] defendant's trial in this cause was being held in Juneau, and which storm prevented airplanes flying on said days, and that defendant had no means of anticipating that such storm would arise and that she would be unable to obtain the attendance of said Dixon and Holmquist; all of which more fully and clearly appears in the stenographic notes of the official court stenographer, taken at said trial, which by reference thereto are hereby made a part hereof.

2. For numerous errors committed by the trial Judge in said trial, to which exception was taken by the defendant at said trial, and all of which appear in the stenographic notes of said official court stenographer, which notes by reference are hereby made a part hereof, and particularly in admitting evidence, over defendant's objection, adduced by the witnesses Miller, Bowman, Kavander and Mansfield, and in admitting in evidence, over defendant's objections, plaintiff's Exhibits Nos. 1 and 2, and in refusing to receive though duly offered, certain evidence, as appears in said stenographic notes, from defendant and from the witness Rands.

3. Error committed by the Court, to which exception was duly taken, in giving to the jury his

instructions 5 and 6, and not giving in substance and effect that certain written requested instruction filed with and presented to the Court on April 6, 1945, or defendant's certain two requested instructions Nos. 5 and 6.

4. That the evidence adduced at said trial was insufficient to justify that certain verdict finding the defendant guilty, which verdict was filed herein on April 9, 1945, and that it is against the law, and that said verdict is contrary to the weight of evidence and is not supported by substantial evidence.

5. The court erred in denying defendant's motion, which was in substance and effect a motion for acquittal, made by her at the conclusion of the evidence, in which she moved that the Court direct the jury to return a verdict finding her not guilty.

6. That defendant was substantially prejudiced and denied a fair trial by reason of the following circumstances: The attorney for the government, in his final argument before the jury, over defendant's objections, stated what purported to be the law governing violations of the statute of which by the indictment herein the defendant was accused of having violated.

## XXVIII.

The Court erred in making and entering its judgment herein whereby defendant was sentenced to be imprisoned for three years and to pay a fine of \$2500.00 and to stand committed until said judgment was served and paid, which judgment was entered herein May 4, 1945.



Wherefore defendant prays that the Judgment above referred to may be reversed.

HOWARD D. STABLER

M. E. MONAGLE

R. E. ROBERTSON

Attorneys for Defendant.

Copy received August 4th, 1945.

R. L. TOLLEFSEN

Ass't. United States Attorney,  
Attorney for Plaintiff. [244]

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In the District Court for the Territory of Alaska,  
Division Number One, at Juneau

MINUTE ORDER MADE ON AUGUST 4, 1945  
Entered Journal #17, Page 88

[Title of Cause.]

At this time there was presented to the Court by M. E. Monagle and H. D. Stabler of attorneys for defendant, Bill of Exceptions and Assignment of Errors. This matter came before the Court for settlement of the Bill of Exceptions. M. E. Monagle and H. D. Stabler of attorneys for defendant were present in behalf of defendant and R. L. Tollefsen, Assistant United States Attorney, was present for the Government. Thereupon the Bill of Exceptions and Assignment of Errors was presented to the Court who ordered them filed. Thereupon Mr. Tollefsen asked for time in which to examine the Bill of Exceptions they having been served on him



yesterday at 4 p.m. and he was given until 10 a.m. August 18, 1945, at which time the Bill of Exceptions would be taken up for settlement.

MINUTE ORDER MADE ON AUGUST 25, 1945

Entered Journal #17, Page 97

[Title of Cause.]

At this time this matter came before the Court for settlement of the Bill of Exceptions herein. Messrs. Monagle and Stabler appeared in behalf of defendant-appellant and R. L. Tollefsen, Acting U. S. Attorney, appeared in behalf of plaintiff-respondent. Thereupon defendant agreed in open court to amend Bill of Exceptions in compliance with Plaintiff's Motion to Amend proposed Bill of Exceptions and it was so ordered by the Court. And the Court further ordered that the Clerk insert the pages submitted, in compliance with plaintiff's motion and make the interlineations agreed upon and submit the Bill of Exceptions as amended to the Court for approval on or before Saturday, September 1st at 2 p.m. The following [245] are the corrections ordered made, on page 122, line 3 the word "paid" was changed to "pain", on page 136, line 3, the word "reframe" was changed to "refrain," on page 162, line 20, after the word "regular" there was added the words "and legal" by interlineation. Thereafter plaintiff's Motion to Complete the record was taken up and defendants agreeing thereto, the Court allowed the same, and signed an order thereon. [246]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PRESENT  
AND SETTLE BILL OF EXCEPTIONS

Now on this day on oral motion of defendant made in open Court and the Court being fully advised in the premises,

It is hereby ordered that the time within which to present, settle and allow the bill of exceptions is hereby extended to and including noon of August 25, 1945.

Done in open Court this 17th day of August, 1945.

GEO. F. ALEXANDER

District Judge.

O.K.

R. L. TOLLEFSEN

Asst. U. S. Attorney,  
Attorney for Plaintiff.

R. E. ROBERTSON

Attorney for Defendant.

[Endorsed]: Filed August 17, 1945.

Entered Court Journal No. 17, Page 94. [247]

---

[Title of District Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT  
OF RECORD

To the Clerk of the District Court, Juneau, Alaska:

Please prepare a transcript of record in the above entitled case, including therein the following papers, to-wit:

1. Indictment.
2. Arraignment of March 26, 1945 (Journal minutes).
3. Plea of not guilty to Indictment, March 26, 1945 (Journal minutes).
4. Verdict.
5. Motion for acquittal.
6. Motion for judgment notwithstanding the verdict.
7. Motion for new trial.
8. Order overruling motions for acquittal, for judgment notwithstanding the verdict, and for new trial, May 2, 1945 (Journal 17, p. 4).
9. Judgment and Commitment.
10. Notice of Appeal.
11. Clerk's Statement of Docket Entries.
12. Order admitting Defendant to Bail.
13. Minute order entered Journal 17, page 27.
14. Order allowing Defendant 90 days in which to file Transcript of Record, Bill of Exceptions, and Assignments of Error.
15. Cost Bond, Bail Bond, and Supersedeas Bond, and Order Approving.
16. Bill of Exceptions, and Order Allowing.
17. Assignment of Errors. [248]
18. Minute Order entered by Court on August

4, 1945, allowing United States Attorney until 10:00 a.m. on August 18, 1945, to examine Bill of Exceptions (Journal 17, p. 88).

19. Minute Order of the Court made and entered on August 25, 1945, extending the time to settle the Bill of Exceptions to September 1, 1945 (Journal 17, p. 97).

20. Order of August 17, 1945, extending time to Settle Bill of Exceptions.

21. This Amended Praecipe.

Kindly prepare said transcript in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit Court of Appeals and forward it in accordance with those rules, to that Court.

R. E. ROBERTSON

HOWARD D. STABLER

M. E. MONAGLE

Attorneys for Defendant.

Copy received August 28, 1945.

R. L. TOLLEFSEN

Asst. U. S. Attorney,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 28, 1945. [249]

[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

United States of America,

Territory of Alaska,

First Division—ss.

I, John H. Walmer, Clerk of the District Court for the Territory of Alaska, Division Number One, do hereby certify that the foregoing attached two hundred and forty nine (249) pages of typewritten matter, numbered from 1 to 249, inclusive, constitutes a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in cause No. 1416-KB, wherein Maude Anderson is Defendant-Appellant and the United States of America is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause and the return thereof in accordance therewith.

And I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification, amounting to One Hundred One and 45/100 (\$101.45) Dollars has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my



hand and the seal of the above-entitled Court this  
12th day of October, 1945.

[Seal]

JOHN H. WALMER,

Clerk.

By: J. W. LEIVERS

Deputy.

---

[Endorsed]: No. 11092. United States Circuit  
Court of Appeals for the Ninth Circuit. Maude  
Anderson, Appellant, vs. United States of America,  
Appellee. Transcript of Record. Upon Appeal  
from the District Court for the Territory of Alaska,  
Division Number One.

Filed October 23, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit at San Francisco

No. 11092

MAUDE ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND REQUEST  
TO PRINT ENTIRE RECORD

To the Honorable Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:

Comes Now the Appellant, Maude Anderson, and respectfully states that she desires to adopt as her points on her appeal herein all of her assignments of error appearing in the transcript of her appeal record, and requests that the appeal record be printed in its entirety. Dated at Juneau, Alaska, this 3rd day of November, 1945.

Respectfully submitted,

R. E. ROBERTSON

H. D. STABLER

M. E. MONAGLE

Attorneys for Appellant

To R. L. Tollefson, Esquire,  
Assistant United States Attorney,  
Ketchikan, Alaska.

Sir:

Copy of the foregoing is hereby served upon you by mail, and notice is hereby given you by such copy of the contents of the foregoing documents.

Please acknowledge receipt of copy direct to the Clerk of the above entitled court.

Yours truly,

R. E. ROBERTSON

Counsel for Appellant.

[Endorsed]: Filed November 6, 1945. Paul P. O'Brien, Clerk.



IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

MAUDE ANDERSON,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT  
FOR THE TERRITORY OF ALASKA,  
FIRST JUDICIAL DIVISION

---

**Appellant's Opening Brief**

---

R. E. ROBERTSON,

H. D. STABLER,

M. E. MONAGLE,

Attorneys for Appellant.

200 Seward Building,  
Juneau, Alaska.

FILED

PAUL F. O'BRIEN,  
CLERK





IN THE

**United States Circuit Court of Appeals**

*For the Ninth Circuit*

---

MAUDE ANDERSON,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT  
FOR THE TERRITORY OF ALASKA,  
FIRST JUDICIAL DIVISION

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**Appellant's Opening Brief**

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R. E. ROBERTSON,

H. D. STABLER,

M. E. MONAGLE,

Attorneys for Appellant.

200 Seward Building,  
Juneau, Alaska.

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IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

MAUDE ANDERSON,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

ON APPEAL FROM THE DISTRICT COURT  
FOR THE TERRITORY OF ALASKA,  
DIVISION NO. 1.

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**BRIEF OF APPELLANT**

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This is an appeal by the appellant, who was the defendant below, from a judgment of the District Court for the First Judicial Division of the Territory of Alaska sentencing her to serve a term of three years in the Federal penitentiary and to pay a fine of \$2,500 upon her conviction of the crime of violating the White Slave Traffic Act. (See: *infra* p. 104).

## STATEMENT OF BASIS OF JURISDICTION

1. The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal. Sec. 225, Title 28, U.S.C.A., Judicial Code, Sec. 128, as amended, provides:

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions . . . .

“Third. In the District Court for the District of Alaska, or any division thereof, and in the District Court of the Virgin Islands, in all cases; and in the United States District Court for the District of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122).”

2. The District Court for the Territory of Alaska had jurisdiction in the first instance.

### GENERAL JURISDICTION OF DISTRICT COURT

“District Court established; judges; divisions; their boundaries. There is established a District Court for the Territory of Alaska, with the jurisdiction of district courts of the United States, and with the general jurisdiction in civil, criminal, equity and admiralty causes . . . .” 48 USCA No. 101; Sec. 1091, CLA 1933.

### STATEMENT OF THE CASE

The appellant, Maude Anderson, hereinafter called the defendant, was convicted of violating the White Slave Traffic Act (Act June 25, 1910, c. 395, Sec. 2, 36 Stat. 825; 18 USCA 398) in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, on April 7, 1945.

## THE INDICTMENT

The Indictment charged "that Maude Anderson on or about the 25th of November, 1941, at Sitka, in Division Number One, Territory of Alaska, and within the jurisdiction of said Court, did, wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States and the Territory of Alaska." (Tr. 2, 3).

## JUDGMENT AND COMMITMENT

On May 4, 1945, the District Court adjudged "that it is the judgment of the Court that the defendant, Maude Anderson, is guilty of the crime of Knowingly Causing and Aiding Transportation of a Woman in Interstate Commerce for Purpose of Prostitution, in violation of Title 18, U.S.C.A., Section 398, as charged in said Indictment, and it is the Sentence of the Court that the defendant be imprisoned in the Federal Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of Three (3) Years, and that the defendant pay to the United States of America a fine of Two Thousand Five Hundred Dollars (\$2,500.00), that it have execution therefor, that the

defendant be committed to said Penitentiary until said fine is paid, and that said defendant stand committed until the sentence herein imposed is fully executed and paid." (Tr. 11, 12).

### SPECIFICATION OF ERRORS

We believe, for purpose of argument, defendant's assignments can be logically classified under the points, namely:

(A) Evidence of transportation of other girls than one named in the indictment and of method of distribution of prostitution earnings was incompetent and prejudicial.

(B) Abuse of discretion in denying defendant's motion for continuance and in rejecting evidence offered by her to show prosecuting witness Miller motivated by spirit of revenge.

(C) Witness Bowman's testimony of agent Miller's acts and declarations, made and done beyond defendant's presence, could not prove existence of agency and were inadmissible.

(D) Accomplice Miller's testimony of contents of letter which she claimed defendant had written to her but which Miller had deliberately destroyed because she deemed it incriminatory was neither corroborative nor admissible.

(E) Telegram, Plaintiff's Exhibit 1, which accomplice Miller testified she sent to defendant, was admitted without proof of having been sent at defendant's request or direction and was not binding on defendant.

(F) Court refused defendant's request to charge on subject of credibility of accomplice Mil-



ler's testimony, as required by Section 4263, CLA 1933, and on subject of necessity of accomplice's testimony being corroborated by independent evidence, as required by Section 5352, CLA 1933, and yet its own instructions entirely ignored Section 4263, 4th Subdivision, and misstated and misconstrued requirements of Section 5352.

(G) Court refused defendant's request to charge, notwithstanding Court itself gave no charge on subject of necessity of proper proof of relationship of agent and principal between witness Miller and defendant.

(H) Court refused defendant's request to charge that no crime would be committed, but on the contrary charged that a crime would be committed by defendants' promise or agreement with Miller to pay or furnish the means of transportation of the girl to be transported even though defendant did not actually pay or furnish any such means of transportation.

(I) Court's instructions placed burden upon defendant to prove she was not an accomplice of witness Miller.

(J) Entire lack of independent evidence, as required by Section 5352, CLA 1933, to corroborate the accomplice Miller's testimony.

## ARGUMENT

- (A) EVIDENCE OF TRANSPORTATION OF OTHER GIRLS THAN ONE NAMED IN THE INDICTMENT AND OF METHOD OF DISTRIBUTION OF PROSTITUTION EARNINGS WAS INCOMPETENT AND PREJUDICIAL.

Over defendant's objection that it was prejudicial to the defendant and that she was not accused by the



indictment of transporting or assisting to transport any one but Gloria Bowman, the Court permitted the accomplice Miller to testify that she had procured two more girls for defendant (Tr. 32 to 37), which objection is the basis of defendant's Assignment No. XI (Tr. 225 to 230), and also over defendant's objection that it was incompetent, irrelevant, immaterial and not binding upon defendant, permitted accomplice Miller to further testify as to the arrangements she made to transport these other two women (Tr. 62, 63), which objection is the basis of defendant's Assignment V (Tr. 236, 237).

The Court also, over defendant's objection, permitted the witness Cavender (Tr. 74) and the witness Gloria Bowman (Tr. 88) to both testify as to the financial arrangements or distribution of their earnings from prostitution, which objections are the basis of defendants' respective Assignments VII (Tr. 237, 238) and X (Tr. 240).

Certainly neither Miller's arranging to send two other prostitutes to Sitka nor the manner of distributing the prostitution earnings of either defendant Miller or of the witness Bowman proved the commission of the crime or defendant's connection therewith. The fact was not disputed that after the witness Bowman reached Sitka she did work as a prostitute in the defendant's house (Tr. 88).

We submit that this evidence was incompetent and its interjection into the suit could only and actually did greatly prejudice defendant.

(B) ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION FOR CONTINUANCE AND IN REJECTING EVIDENCE OFFERED BY HER TO SHOW PROSECUTION WITNESS MILLER MOTIVATED BY SPIRIT OF REVENGE.

The trial Court refused to continue the trial over until the arrival of defendant's witnesses Lou Dixon Northrup and Irene Holmquist, by whom defendant offered to prove:

That the witness Miller informed Northrup and Holmquist that she, Miller, intended to set up her own private house of prostitution and obtain girls to work therein, and that the defendant was going to do some work on and enlarge a building so that Miller could use it for a house of prostitution; and that, when Miller returned to Sitka, Alaska, from the states in January, 1942, she told Northrup and Holmquist in substance that she, Miller, would get even with the defendant for not building this house of prostitution for her, Miller, in accordance with their agreement, if it took her, Miller, the rest of her life;

That Holmquist is a reputable housewife and has never been a prostitute or connected with prostitution in any way and had no criminal record of any kind to the best knowledge of defendant's counsel.

That Northrup was formerly a prostitute and was present and working in the Lake View Cottage in Sitka, Alaska, in November, 1941, when Miller was working there and managing the operations of that house of prostitution; that Northrup had discontinued and for many months had not practiced prostitution, and recently had owned and personally operated her own small mercantile store

in Sitka, and for sometime last past had been employed as a laborer in the sawmill of the Columbia Lumber Company in Sitka, Alaska, and is and for many months has been living a reputable life. (Offer in ~~ver~~batim, see: Tr. 182, 183).

Defendant had previously made her oral motion:

“We move at this time that the case be continued until the arrival of Lou Dixon Northrup and Irene Holmquist from Sitka. These two witnesses were subpoenaed as soon as the defense knew that the case would be on trial—that is day before yesterday—and they would have been here if it was possible for an airplane to get to Sitka and bring them here. They were prevented, the plane was prevented from going for and bringing them because of the Taku wind that was blowing yesterday and today. There is no other means of transportation that would get them here in less than sixteen hours, except an airplane. It is physically impossible for them to get here. It has been physically impossible for them to get here by any means of transportation since they were subpoenaed. This case was originally set for next Wednesday for trial and was moved up because in another case the defendant plead guilty and the case did not go to trial. The witnesses could have arrived here on a regular steamer, on the Northland, bringing them back to Juneau Monday. They would have arrived here not later than next Monday night, which would have been twenty four hours—

“The Court: You mean last Monday?

“Mr. Monagle: No. The Northland went yesterday to Sitka. Had the case come up on the date regularly set for it, they would have been here by Monday and the witnesses would have been here.” (Tr. 181, 182.)

After making her offer of proof, defendant's counsel further said:

"I would like also to add that the fees of the two witnesses have been advanced and arrangements have been made to pay their airplane fare and any delays and the cost of the charter trip on the airplane, and the only thing preventing the witnesses from being here is the inclement weather." (Tr. 183).

No refutation was made of defense counsel's statement. The subpoena is printed in full in the record. (Tr. 179). The return, showing service, is also printed in full in the record. (Tr. p. 180).

The United States Marshal stated that the subpoena "was wired day before yesterday to the deputy in Sitka, with instructions Mr. Monagle gave me that transportation was paid for and arranged and for them to come to Juneau. We got a wire back from the deputy that he served one and the other witness was in Lena Bay. \* \* \* The subpoena was sent to Sitka, the original. He served a subpoena ticket, according to his wire, and notified the plane to pick her up on the way in." (Tr. 184).

Previously during the forenoon of April 6, 1945, (see Tr. 137 for date) defendant's counsel had informed the Court:

"We have two witnesses who are subpoenaed to be here, and we have arranged for their transportation by airplane. It has been impossible to get them here. The case was set for trial next



Wednesday, and it is no fault of the defendant they weren't here or subpoenaed at any earlier date. We offered to charter a plane, but it hasn't been physically possible to get them here. The airplane company advised me that they would get them here this afternoon if it is possible to get to Sitka and Lena Bay. \* \* \* \* \* It wasn't our purpose, and isn't our purpose to delay this trial, but the Court knows there was a case went by the board—the defendant plead guilty—which it was anticipated would be on trial at this present moment. Naturally we didn't subpoena our witnesses who we expected to get. \* \* \* \* \* They were subpoenaed as soon as we knew this case was on trial. The subpoenas were sent by wire. It was the only physically possible thing we could do. If we had known, we could have got them over here Monday, but no planes flew over here yesterday whatever. I have checked with the airplane company—last night late and also this morning—they thought about two or three they might get over this afternoon.” (Tr. 175, 176).

The Court: “I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court.” (Tr. 177).

Mr. Monagle: “The calender was only just set. The other case was set first. We didn't know—the defendant can't afford to bring witnesses weeks ahead like the government.” (Tr. 177).

The Court: “It is just as much to the interest of the defendant to get her witnesses here as the government.” (Tr. 177).

Mr. Monagle: “I don't mind a week ahead. We anticipated that.” (Tr. 177).

The Court: “We are not going to wait on them. In any event, if they get here today, or in



the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account. Has the government any rebuttal?" (Tr. 177).

Mr. Jernberg: "No, your Honor. The defendant hasn't rested." (Tr. 177).

Mr. Robertson: "The defendant hasn't rested, and we don't intend to rest until they get here. If the Court says we have to, we will make an offer of proof what the witnesses will testify." (Tr. 177).

The defendant then made her motion for continuance (Tr. 181, 182, 183), and her offer of proof (Tr. 182, 183), and called the Court's attention to having laid the foundation for the impeaching of the witness Miller by both these witnesses, that she made threats against the defendant (Tr. 185); which foundation was laid by the defendant asking the witness Miller when the latter was upon the stand, i.e.:

"Q. Isn't it a fact, Miss Miller, after you returned to Sitka the latter part of January or early February, 1942, and before your departure from Sitka, in March, 1942, sometime during that period in Sitka, Alaska, you approached Irene Holmquist, knowing she was a sister of Mrs. Anderson's, and told Irene Holmquist that you were going to get a revenge against Mrs. Anderson for having failed to build this house for you?

"A. No.

"Q. Wait a minute—and you were going to try to get her by accusing her of furnishing or aiding in furnishing transportation of these three

women from Seattle to Sitka, or in substance, didn't you tell Irene Holmquist that?

"A. I did not (Tr. 54).

"Q. Do you know a girl over in Sitka by the name of Lou Dixon or Northrup, that formerly was a prostitute in Sitka? (Tr. 55).

"A. I know her in a way. I am not very well acquainted with her.

"Q. Now, during this period, sometime during this period between the latter part of January and early February, 1942, and the date in March, 1942, when you left Sitka, did you not, in Sitka, Alaska, or vicinity, talk with Lou Dixon and tell her that you were going to get even with Maude Anderson because she failed to build this house for you, by accusing her of either furnishing or aiding in furnishing transportation of these three women from Seattle to Sitka?

"A. I did not.

"Q. Or tell Lou Dixon that in substance?

"A. No." (Tr. 56).

The Court, although recognizing the importance of this offered impeaching evidence, denied the continuance:

"In any event, and whether you did or did not, that is the very essence of your defense in this case, that this is a piece of spite work on the part of the prosecuting witness, and you do know that you must have that in even before the defendant is entitled to impeach, but that is no excuse for not having the witnesses here. It is true I called a criminal calendar last Friday, which was the 30th

of March, and I set the calendar tentatively, but I notified all defendants and their attorneys to be ready at all times whenever their cases were called. I only set a time tentatively and as a matter of convenience. The defendant has been here, to my knowledge for at least ten days or two weeks. There is no reason why, if these witnesses were available, they shouldn't have been here. The motion for continuance will be denied.

"Mr. Monagle: We ask for an exception, if it may please the Court." (Tr. 185, 186).

Defendant's witness Rands, to a question as to what witness Margie Miller had said about defendant, already had testified:

"A. Well, Margie was quite peeved and put out because the little house she figured on building wasn't built. I knew there was some riff between Margie . . . .

"The Court: Never mind. Tell what was said.

"A. She said she figured it would be built when she got back and it wasn't and that she—I asked her what she was going to do and she said probably she would have to be a mistress in this house or something." (Tr. 110).

The Court had also rejected defendant's offer to prove by herself that witness Miller was quite angry because, when she returned to Sitka in January, 1942, she found that defendant had not caused to have built the house which Miller wanted for her own house of prostitution (Tr. 174), which refusal is the basis of Assignment No. XV. (Tr. 248).

No opportunity was presented to defendant to later produce witnesses Northrup and Holmquist, even had the weather subsequently permitted their arrival in Juneau by airplane that very afternoon because immediately thereafter, save for the interposing of defendant's motion for a directed verdict and argument thereon and the Court's ruling thereon, the case went to the jury as the following proceedings show:

"The Court: Is there any other rebuttal?

"Mr. Jernberg: No rebuttal, if the Court please.

"Mr. Robertson: Before the Court calls in the jury . . .

"The Court: I understand the defense rests.

"Mr. Robertson: The Court overruled our offer. We rest subject to our motion and exception.

"The Court: The Court ruled on the motion. I am asking if there is anything further, if the defense rests?

"Mr. Robertson: We have nothing further. We move the Court to instruct the Jury to return a verdict of not guilty against the defendant on the grounds that the government entirely failed to make out a case. \* \* \* \* \* (Tr. 186).

" \* \* \* \* \*

"Thereupon argument was had by counsel for the respective parties and thereafter the jury was duly admonished and the Court then recessed until 10 o'clock a. m. the following day, April 7, 1945. \* \* \* \* " (Tr. 192, 193).



The impeaching questions (Tr. 54, 55, 56), and the offer of proof (Tr. 182, 183) indisputably reveal that defendant intended to show the witness Miller, who was even characterized by the trial Court itself as being the "prosecuting" witness (Tr. 185), had the motive of revenge in giving her evidence against the defendant. The trial Court, also, at least impliedly, conceded such evidence was competent evidence, by referring to the offered evidence as, "that is the very essence of your defense in this case, that this is a piece of spite work on the part of the prosecuting witness." (Tr. 185).

Animosity or motives of revenge undoubtedly may be shown to test the credibility of a witness. The Colorado court substantially said:

Accused has right to show animus of the people's witnesses, and their interest and motives in testifying against him, and that a people's witness is actuated by motives of revenge against the accused \* \* \* .

*Trozzo v. People*, 117 P. (Colo.) 150.

*Curtis v. People*, 211 P. (Colo.) 381, 382.

*Furlong v. U. S.*, 10 F. (2d) 492.

"Friendliness or animosity in general. As bearing upon credibility, it may be shown and considered whether the relations of a witness with or his feelings toward a party are friendly or hostile."

70 CJ 984, Par. 1149 (a).

We realize this Court has held that the continuance of a criminal trial is discretionary with the trial court;



but, we urge that the facts at bar disclose far more than simply that the defendant had sought to have witnesses brought at government expense from the States to Alaska and without showing that the facts, to which those intended witnesses would testify, could not be proved by other witnesses at or near the place of trial. The latter were, if we correctly understand the decision, the meagre facts in

*Shea v. U. S.*, 260 Fed. (9 CCA) 807, 810.

In this case no denial is made that the desired witnesses Northrup and Holmquist would testify in accordance with the respective offers. (Tr. 182, 183).

True, the trial Court said:

“I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court.” (Tr. 177).

“It is just as much to the interest of the defendant to get her witnesses here as the government.” (Tr. 177).

“We are not going to wait on them. In any event, if they get here today, or in the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account.” (Tr. 177).

“It is true I called a criminal calendar last Friday, which was the 30th of March, and I set the calendar tentatively, but I notified all defendants and their attorneys to be ready at all times whenever their cases were called. I only set a time tentatively and as a matter of convenience. The defendant has been here, to my knowledge for at

least ten days or two weeks. There is no reason why, if these witnesses were available, they shouldn't have been here." (Tr. 186).

But, we urge the Court thereby in no wise refuted the defendant's contention: The subpoena was issued April 4, 1945 (Tr. 179), as soon as defendant knew the case would be on trial—that is the day before yesterday (Tr. 181); the trial commenced at 2 p. m. April 4, 1945 (Tr. 24); it had been originally set for next Wednesday (Tr. 175, 181), (Note: Next Wednesday would have been April 11, 1945), but was moved up because another case was not tried as the defendant in it plead guilty (Tr. 181), which latter case was set first (Tr. 177); the witnesses would have been present if it had been possible for an airplane to go to Sitka, but the Taku wind [†] prevailing yesterday (April 5) and today (April 6), prevented it; no means of transportation except airplane could get the witnesses to Juneau in less than 16 hours; it had been physically impossible to get the witnesses to Juneau since they were subpoenaed; no planes flew over yesterday whatever; defendant had arranged for their transportation by airplane, and offered to charter an airplane. (Tr. 175, 176, 177, 181, 182).

The United States Marshal corroborated the defendant that she had arranged and paid for airplane transportation. (Tr. 184).

In the face of defendant's undisputed diligence, immediately she knew her trial was to commence on April 4 instead of on April 11 as she had anticipated, [†] App. 1.

to obtain the attendance of the two witnesses which she was unable to do because of the weather conditions prevailing on April 5 and 6 (which facts give a faint picture of the difficulties encountered by litigants, at least in Southeastern Alaska, where the only means of travel between the communities of Juneau and Sitka is by either water or air and dependent at all times upon weather conditions), the trial Court denied the continuance of the trial until the two witnesses could arrive.

We submit that that ruling constituted an abuse of discretion which deprived defendant of her rights and constituted reversible error.

We urge that the Court's setting of her case to follow the trial of another, which latter case suddenly went by the boards because the defendant therein pleaded guilty, should not be held to penalize the defendant simply because neither she nor her counsel could foresee such unexpected quick ending of the other case and predict that weather conditions would arise to prevent defendant from having her witnesses in attendance for such advanced trial date of her own case.

(C) WITNESS BOWMAN'S TESTIMONY OF AGENT MILLER'S ACTS AND DECLARATIONS, MADE AND DONE BEYOND DEFENDANT'S PRESENCE, COULD NOT PROVE EXISTENCE OF AGENCY AND WERE INADMISSIBLE.

Over Defendant's Objections the government witness Bowman was permitted to testify:

"Q. What were the circumstances under which you met her?

"Mr. Robertson: We object on the ground that it is incompetent, irrelevant and immaterial, and not binding on the defendant.

"The Court: She may answer.

"Mr. Robertson: Exception.

"A. Well, I was brought to the hotel by Billy Day, and she was there.

"Q. What transpired at that time?

"A. She asked me if I wanted to go to Alaska.

"Mr. Robertson: I will renew my objection on the grounds that it is incompetent, immaterial and irrelevant, and transpired in the absence of the defendant.

"The Court: Answer the question.

"Mr. Robertson: Exception.

"A. She" (Miller) "gave me \$70.00, and I bought a ticket on the North Coast to Sitka, Alaska, and left the next day for Sitka." (Tr. 85, 86).

This objection is the subject of Assignment IX. (Tr. 239, 240). Bowman therein related acts and declarations of Miller in Seattle, beyond defendant's presence. (Tr. 85).

The evidence was admitted in direct violation of the rule, viz:



“The rule cited by appellant that ‘the declarations of an agent are not admissible to prove the fact of agency’ refers exclusively to declarations made by the agent outside the courtroom.”

*Shama v. U. S.*, 94 F. (2d) 1, at 5.

(D) ACCOMPLICE MILLER'S TESTIMONY OF CONTENTS OF LETTER WHICH SHE CLAIMED DEFENDANT HAD WRITTEN TO HER BUT WHICH MILLER HAD DELIBERATELY DESTROYED BECAUSE SHE DEEMED IT INCRIMINATORY NEITHER CORROBORATIVE NOR ADMISSIBLE.

Over the defendant's objection “that it is not binding on the defendant, is not substantiated or authenticated, and is something that happened after the date of the defendant's being accused of committing the crime, and wouldn't be binding on her” (Tr. 40), and “we object to all testimony about this letter on the grounds that it is not authentic and there is no proof as to the date or time and it is incompetent, irrelevant and immaterial, and self serving on the part of the witness” (Tr. 42), the witness Miller, who plead guilty to the crime involved (Tr. 65) and who the Court characterized as being the prosecuting witness (Tr. 185) and as being “admittedly an accomplice in the crime charged against the defendant” (Tr. 201), testified to the contents of a letter, which she herself had destroyed (Tr. 39) before she returned to Sitka in January, 1942, because it would be evidence against herself and the defendant (Tr. 52), namely:



"In that letter Maude said the two girls hadn't shown up and she didn't know where they were. She was talking about the girls, the houses, and since the war was on they were having blackouts and that business was bad and she might have to close. She said she decided not to build on to her mother's house for me."

"Q. Did she state anything in that letter about Gloria Virginia Bowman? Yes. She said one girl had arrived by boat, but those on the plane didn't." (Tr. 42).

Witness Miller had previously testified in regard to this destroyed letter, viz:

"A. I received it when I was in Los Angeles, shortly after the war was declared. That would be along .....

"The Court: Before or after you sent the girls up here?

"A. After—that I received the letter.

"The Court: Did it have to do with the sending of these girls up here? A. Yes." (Tr. 40).

This letter, if ever written, must have been written, as so admitted by the witness Miller, after the commission of the crime, because Miller testified she remained in Seattle "Just long enough to get the girls and then I went to Los Angeles" (Tr. 52), where she received the alleged letter (Tr. 40). The witness Gloria Virginia Knapp Bowman said she didn't recall the exact date she arrived in Sitka, "but it was the latter part of November, almost December" 1941. "I

was there by December of 1941" (Tr. 86). Assuming she is the Jean LaRue listed on the ship's manifest, Plaintiff's Exhibit No. 2, the SS North Coast arrived in Juneau December 3, 1941 (Tr. 97). This Court will judicially notice that Pearl Harbor occurred on December 7, 1941.

Furthermore, unless the letter was written after the commission of the crime, the defendant could not have stated therein, as claimed by Miller, that "one girl had arrived by boat, but those on the plane didn't." (Tr. 42).

The defendant testified:

"Q. Now, you heard Margie Miller testify yesterday that you had written her a letter, or that she had received a letter from you when she was in Los Angeles, sometime in the fall of 1941, I believe she said around the first of December or thereabouts, in which you said in substance that the girls hadn't arrived in Sitka. Did you write Margie Miller any such letter?

"A. No, I didn't, for I didn't know any address of Margie's.

"Q. Did you write any letter whatever to Margie Miller after she left Sitka somewhere around Thanksgiving of 1941, between that date and say January 1, 1942? Strike that question. Did you write Margie Miller a letter at any time after she left Sitka in the fall of 1941 and until she returned in the spring of 1942?

"A. No, I did not.

“Q. Did you send Margie Miller any telegrams during the period after she left Sitka in the fall of 1941 and until she returned to Sitka in 1942? A. No.” (Tr. 141, 142).

Not an iota of evidence was received, or even offered, to prove either the contents or the once existence of this alleged letter, except the testimony of Miller. Hence, only a moot question would lie upon which to base a discussion, inasmuch as it was, if ever, written after the the commission of the crime, of the admissibility or inadmissibility of the letter itself, if it had actually been produced.

But, what fairness can exist to extend the rule of the admission of secondary evidence to an instance, not where the primary evidence has been lost or mislaid, but where it has been deliberately destroyed? The witness Miller testified she destroyed the letter (Tr. 39). She sought to justify her destruction of it by the excuse: “Because it could be evidence against Maude and evidence against me.” (Tr. 52).

She thus attempts to bolster up her verbal story with documentary evidence, true no longer extant, although she herself by its deliberate destruction has prevented defendant from inspecting it, from testing its date, hand-writing, language, form of construction, contents, signature. In fact, Miller herself by her own acts made it impossible to apply any of these tests, or to even prove such letter never existed except by a flat

denial thereof, which Defendant emphatically did. (Tr. 141).

The general rule on destroyed documents apparently is:

“The rule admitting secondary evidence of the contents of a lost or destroyed writing must be so applied as to promote the ends of justice and to guard against fraud or imposition. It is not, therefore, a matter of course to admit secondary evidence of the contents of a writing upon proof of its destruction, but the cause or motive of the destruction is the controlling fact which determines the admissibility of such evidence.”

22 CJ 1032, Par. 1320 (1)

The only explanation of the letter's destruction is that Miller deemed it might be incriminatory. But, if she is not telling the truth, then indeed ample fraudulent motive existed for her claiming she had destroyed it, because if she admitted its existence then she would have been obliged to have produced it. Surely her explanation is not sufficient within the rule:

“The rule that a proper foundation for the admission of secondary evidence of destroyed writings includes a showing that the destruction was not caused by the voluntary act of the party proffering the secondary evidence does not apply where independent grounds for the admission of secondary evidence exist and the destruction can be satisfactorily explained.”

22 CJS 1199, Par. 706.

We urge that the contents of this letter were not admissible under this Court's decision in

*Ford v. U. S.*, 10 F. (2d) 739, 750,

wherein, in fact, the accused admitted the sending of the challenged telegram. The accomplice Miller destroyed the letter challenged herein. She testified to its purported contents. She is the prosecuting witness whose motives of revenge the Court under its rulings did not permit the defendant to put in evidence. Miller did not testify she knew defendant's handwriting. She did not actually state the letter was written by defendant personally. All she said was that she received the letter from the defendant. (Tr. 39).

Furthermore, Miller's verbal testimony of the contents of the destroyed letter still leaves the testimony Miller's only, and nobody else's, and is far below the Oregon standard of necessary requirement of corroboration of her evidence by some fact deposed to, independently all together of her evidence, which fact, taken by itself, leads to the inference not only that the crime was committed but that the defendant was implicated in it.

*State v. Reynolds*, 86 P. (2d) 413 at 418.

Defendant bases her Assignment IV on this objection. (Tr. 233, 236).



(E) TELEGRAM, PLAINTIFF'S EXHIBIT I, WHICH ACCOMPLICE MILLER TESTIFIED SHE SENT TO DEFENDANT, WAS ADMITTED WITHOUT PROOF OF HAVING BEEN SENT AT DEFENDANT'S REQUEST OR DIRECTION AND WAS NOT BINDING ON DEFENDANT.

Over the objection of the defendant, that "it was not binding on her, that it was incompetent, immaterial, and no proof or any indication of any request for the telegram, or no proof what the telegram might be referring to, and no basis" (Tr. 70) for its admission, the trial Court received in evidence a telegram, Plaintiff's Exhibit 1, which reads:

"Alaska Communication System, Signal Corps.

"United Army Army.

"Received at 26 WXA B 14 WU

"Seattle, Wash., Nov. 29, 1941, 5:30 a.m.

"Maude Anderson, Lake View Cottage, Sitka.

"Airmail two dresses today send coat on

"North Coast need the three badly. Marg."

(Tr. 70, 237).

Defendant reserved the objection as her Assignment VI (Tr. 237), in fact, at the first opportunity, even before the telegram was marked for identification she had objected that it "is not binding on the defendant," (Tr. 38), and saved the point by her Assignment III. (Tr. 231).

The witness Miller, who plead guilty to the crime involved (Tr. 65) and who the Court characterized as being the prosecuting witness (Tr. 185) and as being "admittedly an accomplice in the crime charged against the defendant" (Tr. 201), testified:

"Q. Did you advise Maude Anderson you had procured these three girls? A. Yes.

"Q. By what form of communication? A. Telegraph or code message." (Tr. 37)

"Q. I will show you Plaintiff's Exhibit A for identification and ask if that is the telegram you sent? \* \* \*

"Q. To the defendant Maude Anderson, regarding three girls? \* \* \*

"Q. Is that the telegram you sent?

"A. Yes; that is the same message any way." (Tr. 39)

That is the entire testimony concerning this message by the witness Miller. Nowhere did she testify she sent it at the request of the defendant, except such implications as may be gathered from her previous testimony:

"Q. Was there any arrangement made for you to notify Maude if you obtained any girls?

"A. We had a code message I was to use.

"Q. Tell the jury what that consisted of?

"A. Coats and dresses instead of girls, and instead of 'I am sending' use the words 'Please send me.' 'Please send me a dress by boat,' that meant a girl was coming by boat. If I said 'Please send me a dress by plane,' that meant a girl was coming by plane; so she would know when to expect the girl." (Tr. 26).

To bolster up her story, the witness Miller then continued:

"Q. You say it was Jackie Lugo who was present during the conversation. Do you recall what you were talking about when she was there?

"A. Yes. She only came through for a little bit. We were talking about this message. Maude was talking about it. I didn't want Jackie to hear it. I felt very bad about it at the time because we were discussing the message at the time."

Not until the witness Miller was asked the leading question: "Q. The code you were to use?" did she answer "A. Yes." (Tr. 26).

Previously the witness Miller had not said the witness Lugo was present when the "message" or "code" was dicussed, but simply:

"Q. Prior to the time of your departure on this trip did you have any conversation with Maude Anderson about the procurement of prostitutes.

"A. Yes, that was *understood*." (Italics ours).

“Q. When and where did these conversations take place?

“A. In Maude’s private bedroom.

“Q. Prior to your departure. A. Yes.

“Q. Who was present during these conversations?

“A. Mostly it was just between Maude and myself.

“Q. Did you have any conversation in which a third party was present? A. Only once was there any one present.

“Q. Who was that party?

“A. Maude and I were discussing the trip, and I remember Jackie walking through there.

“Q. Jackie who? A. Jackie Lugo. At that time she was Jackie Lugo.” (Tr. 25).

It subsequently developed at the trial that Jackie Lugo was none other than the witness Mrs. Elvira Cavender (Tr. 75), who testified:

“Q. And prior to the time she” (Miller) “departed did you hear any discussion between her and the defendant Maude Anderson regarding the procurement of additional prostitutes for this house? A. Yes.

“Q. State when and where the discussion was that you heard.

"A. I don't know the exact day but it was during the day sometime. I was only in there for a matter of not more than two minutes. I heard Maude talking to Margie Miller as to how — — —" (Tr. 75).

"Q. Just a minute. Where was this conversation?

"A. In Maude's bedroom, in her private bedroom.

"Q. In the house at Sitka?

"A. Yes, in that house at that time.

"Q. Who else was present at the discussion that took place.

"A. Maude Anderson, Margie Miller, and myself.

"Q. Tell the jury what was said that you overheard.

"A. I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember — coats or dress. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram.

"Q. To what were they referring when they were talking about this code?

"A. Well, it meant girls to bring up to Sitka." (Tr. 76).



Defendant's motion to strike the answer as incompetent and immaterial as to what was meant was denied (Tr. 76), and is the basis of Defendant's Assignment of Error No. VIII. (Tr. 238). The witness Cavender then further testified:

"Q. Do you know what was meant when they were talking about the code?

"A. Yes.

"Q. What did they say?

"A. It was girls. I heard the word 'girls' mentioned. I heard it.

"Q. Do you recall anything else that was said there or what the discussion was at that time?

"A. No. Just about the exchange of what the telegram was supposed to be about clothes and the girls.

"Q. Was anything said about when it should be sent?

"A. I didn't hear the time when it should be sent. No, I didn't.

"Q. At any time in your hearing, at this particular time and place, did Maude ask Margie to procure any girls for her?

"A. To me it looked that way.

"Q. Did she say anything about Margie getting her girls in Seattle that you overheard?

"A. Well, I didn't hear where she would get girls, but I heard that she would get girls and let her know through the wire in the form of clothes." (Tr. 77, 78).

On cross-examination the witness Cavender testified she heard the conversation shortly before the witness Miller went south but she didn't know the exact date; that she was in the defendant's private bedroom for about two minutes, getting change from the defendant, who was sitting in a chair and during the time Miller and defendant continued the conversation; that Cavender didn't remember whether Miller tried to conceal or hide what Miller and defendant were talking about; that she saw no code written out at that time. (Tr. 80, 81).

The government witness Mansfield testified he was present when the deputy Marshal arrested the defendant on August 31, 1944, and that a search was then made, with defendant's consent, of the house in which she was living, and that the telegram, Plaintiff's Exhibit 1, was found in a room, neighboring the one wherein she was arrested, in a bedstand or a small chest of drawers adjacent to the head of a bed, among other correspondence addressed to her and in a Valentine box (Tr. 68, 69); that the search was made after defendant's arrest, and that defendant's oral consent, so given after arrest, was later confirmed by her written consent. (Tr. 71, 72).

The defendant emphatically denied she ever had any conversation with the witness Miller about procuring any girls or making up a code (Tr. 120 to 125); but admitted she received the telegram, Plaintiff's Exhibit

No. 1, and stated she did not answer it and didn't know what it meant (Tr. 126); that the witness Mansfield found the telegram in defendant's mother's room in defendant's private home (Tr. 142, 143).

Again not only upon cross-examination by the U. S. Attorney but by the Court itself, defendant insisted she didn't know what the telegram meant, that she didn't do anything in response to it; that it didn't concern her; that she never answered it. (Tr. 159 to 162).

The telegram bears date November 29, 1941 (Tr. 70). The FBI agent found it nearly three years later, i.e.: On August 31, 1944 (Tr. 68), according to him with other miscellaneous correspondence in a room adjacent to defendant's (Tr. 69, 71), and according to defendant, in her mother's room in defendant's private home (Tr. 142, 143).

Defendant's treatment of the telegram bears out her contention that she knew not what it meant and it didn't concern her. If it in fact was a code, as testified by witness Miller (Tr. 26), between Miller and defendant, then the latter displayed a startling lack of precaution in allowing it to lie around intact, without even concealment, for nearly three years. Would a guilty conscience allow such a telegram to remain in existence for nearly three years, and without ever any discussion between the receiver and the sender about the latter's

having sent it, and even for some two and a half years after the sender had left Alaska? Miller permanently left Alaska in March, 1942. (Tr. 49).

Strangely enough the witness Miller's own conscience was so guilty she took the precaution before returning to Alaska in the latter part of January, 1942, to destroy the letter she claimed defendant wrote her (Tr. 52); but, we may well assume, otherwise she would have testified to it, her guilty conscience did not lead her, after she returned to Alaska at that time and during her stay there until in March, 1942, even though she claimed, "I asked her" (defendant) "if she collected my money from the girl, Virginia Bowman" (Tr. 43), to ever make inquiry whether the defendant had received the telegram, or to suggest that defendant, if she hadn't already done so, should destroy such incriminating evidence against herself, Miller.

Logically, one might think the witness Miller would have been more anxious to destroy a telegram which she claimed she had sent under her own name, than to destroy a letter which she claimed the defendant had written to her.

The record is bare of any evidence that the witness Miller's conscience ever troubled her about this telegram. If it had, we suggest she undoubtedly would have sought to obtain it from defendant or to destroy it, and would have so testified.



We submit there is no evidence that the telegram, Plaintiff's Exhibit No. 1, was sent at the request, either direct or implied, of the defendant, except the evidence of the witness Miller herself. That the telegram is nothing more than a self-saving statement made by Miller, not binding on the defendant, and does not fall within the principle of

*Shama v. U. S.*, 94 F. (2d) 1, at 5.

*Nokes v. U. S.*, 257 F. 413.

If a self-confessed perpetrator of a crime can thus corroborate her own story by the language of her own telegram from a thousand miles distance to the person she charges with being her accomplice in the crime, certainly the provisions of Section 5352, CLA 1933 (Infra, pp. 36) are no longer in effect.

We submit that the admission in evidence of Plaintiff's Exhibit No. 1 was reversible error.

(F) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE ON SUBJECT OF CREDIBILITY OF ACCOMPLICE MILLER'S TESTIMONY, AS REQUIRED BY SECTION 4263, CLA 1933, AND ON SUBJECT OF NECESSITY OF ACCOMPLICE'S TESTIMONY BEING CORROBORATED BY INDEPENDENT EVIDENCE, AS REQUIRED BY SECTION 5352, CLA 1933, AND YET ITS OWN INSTRUCTIONS ENTIRELY IGNORED SECTION 4263, 4TH SUBDIVISION, AND MISSTATED AND MISCONSTRUED REQUIREMENTS OF SECTION 5352.



The government throughout maintained that the witness Marguerite (Margie) Miller was an accomplice; in fact, the Trial Court in its Instruction No. 5 (Tr. 201) specifically said: "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant."

Alaska has in effect the law that a conviction cannot be had upon the uncorroborated testimony of an accomplice.

"Testimony of Accomplice Must Be Corroborated. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

Sec. 5352, CLA 1933.

This statute was taken from the laws of Oregon.

Carters's Annotated Alaska Codes, Sec. 153, Part II, p. 70.

Laws Oregon, Oct. 19, 1864; Hill's Ann. Law, S. 1370.

Alaska also has in effect the law that the court must instruct the jury in proper cases that the testimony of an accomplice ought to be viewed with distrust.

"The jury \* \* \* \* are, however, to be instructed by the court on all proper occasions:

" \* \* \* \* \*

“Fourth: That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution.

“ \* \* \* \* \* ”

Sec. 4263, CLA 1933.

This statute also was taken from the laws of Oregon.

Carter's Alaska Annotated Codes, Sec. 673, pp. 283, 284.

Therefore, when Congress by its Act of March 3, 1899 (30 Stat. 1285, 1302), adopted and made these laws of Oregon the laws for Alaska, undoubtedly the construction of the laws by the Oregon Court was then and there also adopted.

California's similar statute was adopted by Montana, and the Supreme Court of Montana said.

“And under the familiar rule of law that, in adopting a statute from a sister state, we adopt it with the construction given it by the courts of that state, there does not seem to be room for contention here.”

*State v. Connors*, 94 P. (Mont.) 199, at 200.

The law is well stated in Alaska that a statute adopted from another state is adopted with the con-

struction placed upon it by the highest tribunal of that state. Presumably the statute is taken with the meaning it had in such state.

*Steil v. Dessmore*, 3 Alaska 392, 395

*Moore v. Rennick*, 1 Alaska 173, 177

*Robinson v. Belt*, 187 U. S. 41, 23 Sup. Ct. 16

*Henrietta M. Co. v. Gardner*, 173 U. S. 123, 19 Sup. Ct. 327

*Willes v. Eastern Trust Co.*, 169 U. S. 295, 18 Sup. Ct. 347

*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644.

Prior to the adoption for Alaska by Congress on March 3, 1899, of Section 5352, the Oregon supreme court reversed a conviction for adultery because the testimony of the accomplice was not corroborated as provided by this statute and the trial court had refused to instruct the jury in accordance with the statute.

“In the case at bar the only evidence of the commission of the crime is the testimony of the accomplice herself . . . From an examination of all the testimony in support of Mrs. Babb’s statement, we conclude that it does not corroborate the material issue, or present facts from which the commission of the crime can be reasonably inferred, and hence, under the statute, was insufficient to support the conviction, and that the court erred in refusing to give the instruction requested, for which reason the judgment is reversed, and a new trial ordered.”

*State v. Scott*, 42 Pac. 1.

The Oregon court similarly held that a conviction couldn't be had on the uncorroborated testimony of an accomplice in an incest case, viz:

*State v. Jarvis*, 23 P. 251.

See, also: *State v. Carr*, 42 P. (Ore.) 215, 217.

In construing Oregon's statute, identical with Sec. 5352, CLA 1933, *supra*, the Oregon court comparatively recently said:

"What appears to be required is that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed but that the prisoner is implicated in it."

*State v. Reynolds*, 86 P. (2d) 413, at 418.

While we appreciate the Federal rule permitting conviction upon the uncorroborated testimony of an accomplice as stated by this Court in

*Westenrider v. U. S.*, 134 F. (2d) 772,

yet we submit that rule does not apply in Alaska.

This Court has held that the Alaska District Court acts in a dual capacity (1) for administering local laws; and (2) for administering Federal laws; and that this Court's settled practice has been to exercise an independent judgment with respect to both general and local questions emanating therefrom.

*Carscadden v. Territory of Alaska*, 105 F. (2d) 377, 9 Alaska Reports 514, 527.

The Oregon court in the Scott case, after reviewing the common law on the subject of corroboration of accomplice testimony concluded:

“Whatever the rule may have been at common law, the statute now provides that ‘a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of its commission’ Hill’s Code Section 1371.”

*State v. Scott*, 42 P. (Ore.) 1.

We urge this statute is in effect in Alaska and governed the defendant’s rights at her trial.

While we have not found any Alaskan decision directly construing the 4th subdivision, viz: “That the testimony of an accomplice ought to be viewed with distrust, and of the oral admissions of a party with caution” of Sec. 4263, CLA 1933, supra, yet we submit that this Court has at least intimated that it is proper to instruct the jury in accordance with this statute.

*Shea v. U. S.*, 260 Fed. (9CCA) 807, at 810.

The not giving of an instruction pursuant to the California statute similar to Sec. 4263, CLA 1933, supra, has been held error.

*People v. Bonney*, 33 P. (Cal.) 98.

See also: *People v. Sternberg*, 43 P. (Cal.) 401.

*People v. Stryke*, 36 P. (Cal.) 3, at 5.



The only instruction given by the Trial Court in compliance with these two statutes was its instruction No. 6 (Tr. 202, 203), in which the Court quoted verbatim Sec. 5352, CLA 1933, *supra*, but in no wise clarified, to the contrary misconstrued, the provisions of the statute by stating:

“In this connection I instruct you that the witness Marguerite Miller is what is known in law as an accomplice, and I further instruct you that the corroboration required by the statute is corroboration of the accomplice’s testimony to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission.” (Tr. 202).

In his qualification of the statute the trial Court entirely omitted the statutory requirement that the accomplice’s testimony, to justify conviction, must be corroborated “by other evidence.” The statute says: “unless he” (the accomplice) “be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.” To say, as the Trial Court did in effect: “Corroboration is corroboration” means nothing whatever, but, if the language of the instruction means anything, we submit it can only be understood to mean that the jury need not be governed by the statute.

Is “corroboration” or “accomplice’s testimony” modified by the phrase or clause in the instruction, viz.: “to the effect that the defendant Maude Anderson did

actually commit the act constituting the crime charged, or aided or abetted in its commission"? (Tr. 202).

We submit that any intelligent juror would understand, and that proper grammatical construction holds, that "accomplice's testimony", not "corroboration", is modified by that phrase or clause of the Court's instruction No. 6.

The divergent meanings of the entire sentence become apparent by modifying, first "corroboration", and second, "accomplice's testimony" by this particular phrase or clause.

If the phrase or clause is intended to modify "corroboration", then "corroboration", whatever it is, is to be to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission. Under those circumstances "something",—the trial Court didn't say the "something" was independent evidence from some source "other than witness Miller's mouth", or "evidence in addition to or in supplement of witness Miller's testimony"—might be "anything" which within the jury's imagination constituted "corroboration."

If the phrase or clause, as we submit it does, modifies "accomplice's testimony," then the jury was told that any "corroboration" even though it merely showed the commission of the alleged crime, was sufficient so

long as it supported the witness Miller's story that the defendant did actually commit the crime constituting the crime charged, or aided or abetted in its commission.

The statute itself does not treat "corroboration" so lightly. The statute defines "corroboration" by stating in effect, it must be "such other evidence as tends to connect the defendant with the commission of the crime."

Neither construction to be given to the trial Court's instruction No. 6, so defines "corroboration".

The statute further defines "corroboration" by stating "the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

Neither construction of the trial Court's instruction No. 6 so supplementarily defines "corroboration".

Perhaps, far flung imagination, may urge that such statutory definitions are included in that instruction if the clause or phrase, "to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission", is construed, contrary to grammatical rules and to sentence position, to modify "corroboration;" but, certainly even wildest zooming fancy can't include the statutory definitions if that phrase or clause modified "accomplice's testimony."

Are the defendant's rights of liberty and property to be jeopardized by guessing what Instruction No. 6 means or was intended to mean, and how the jury understood the sentence?

Then, too, neither in that nor in any other instruction did the trial court tell the jury that the testimony of the witness Miller, whom the Court despite defendant's objection (Tr. 208-9) had specifically characterized as being an admitted accomplice, ought to be viewed with distrust, and her oral admissions with caution.

Furthermore, the trial Court refused to give Defendant's Requested Instruction No. 6, viz.:

"The laws of Alaska provide that the testimony of an accomplice ought to be viewed with distrust and that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

"You are therefore instructed that you cannot find the defendant guilty of the crime charged in the indictment herein upon the testimony of the witness Miller alone or upon her testimony and other corroborative evidence which tends, if you so find, to connect the defendant with the commission of said crime but which corroborative evidence merely shows, if you so find, the commission of said alleged crime or the circumstances thereof.



“You are further instructed that you must find the defendant not guilty unless you find beyond a reasonable doubt that the witness Miller’s testimony, if you find therefrom beyond a reasonable doubt that she and the defendant were accomplices in the commission of the crime charged in the indictment, was corroborated by other evidence and that such other corroborative evidence not only tended to connect the defendant with the commission of the crime charged in the indictment herein but also was of such nature that you find beyond a reasonable doubt that it more than merely shows the commission of said crime or the circumstances thereof.” (Tr. 194).

The Court’s stated reason for refusing this request was:

“Presented at 9:55 a. m. Saturday a. m. too late for consideration under our rules. Case finished Friday, 4:30 p. m. and Jury instructed Saturday, 10 a. m.” (Tr. 194).

The trial court rule, apparently had in mind in that stated refusal, inasmuch as the trial Court at the instance of the U. S. Attorney required its inclusion in the Bill of Exceptions, was:

“Rule 30—Instruction to Jury. In every case, civil, or criminal, tried before a jury, the attorney for each side may, as soon as the jury is impanelled, submit to the court copies of such requests for instructions as he desires the court to charge; additional requests may be submitted at any time before the argument on the submission of the case to the jury is concluded; each request shall be on a separate sheet of paper, and counsel may cite



thereunder the authorities supporting each request." (Tr. 195). [3]

Defendant admits this Rule 30 at the time of the trial was and now is in effect, but urges:

1. That the rule is not prohibitive but permissive both in its intent and in its language;
2. The trial Court was not obliged to follow its own rule at the expense of committing an error;
3. The rule cannot be construed to repeal a statute; and
4. The rule is not binding on this Court.

Defendant submits that should the rule be construed as a fast, hard, hog-tied regulation, the self-evident result would follow: That, regardless of whether the defendant did or did not, in the defense of her liberty, rely upon Sections 4263 and 5352, CLA 1933, and their binding effect upon the courts, she must stand idly and speechless by, except to take exception to error in any instructions actually given by the court, without any recourse to direct the Court's attention to omissions of instructions required by those statutes, after the rule's time limit once passed.

Defendant does not know how she could call attention to such omission except by a request, oral or writ-

[3] App. 3.

ten. For example, the Court in its Instruction No. 6, or in any other Instruction, did not instruct as we heretofore said, the jury, substantially or otherwise, as required by Section 4263, CLA 1933, *supra*, "That the testimony of an accomplice ought to be viewed with distrust."

The defendant well might have been charged with negligence, or perhaps even with misleading the court, had she stood silent throughout the reading of the Court's instruction to the jury without mention that nowhere therein was the jury told "to view the testimony of an accomplice with distrust."

Probably no such bad faith could have been charged against her, had she, at the conclusion of the charge, said: "I take exception to all of the instructions because nowhere therein is the jury instructed 'that the testimony of an accomplice ought to be viewed with distrust.' "

We submit she pursued the much better procedure, and the only procedure to safely protect her rights, by submitting, even if after the time limit of Rule 30, *supra*, assuming it to be prohibitive and a time limit rule, her Requested Instruction No. 5, in which she specifically asked the Court, in accordance with Section 4263, CLA 1933, *supra*, to instruct the jury: "The laws of Alaska provide that the testimony of an accomplice ought to be viewed with distrust." (Tr. 194).

The remainder of the first paragraph of Defendant's Requested Instruction No. 5 was based upon, in fact it was couched in the exact language of, Section 5352, CLA 1933, *supra*, requiring corroboration of accomplice testimony and defining the nature of such required corroboration.

We submit the second paragraph of Defendant's Requested Instruction No. 6 correctly stated the law in informing the jury: it could not find the defendant guilty

- (a) Upon the testimony of the witness Miller alone;  
or
- (b) Upon Miller's testimony and other corroborative evidence which
  - (1) tended to connect the defendant with the commission of the crime but which merely shows
    - (a) the commission of the crime, or
    - (b) the circumstances thereof.

We submit the third paragraph of Defendant's Requested Instruction No. 5 correctly stated the law in informing the jury it should find the defendant not guilty unless the jury found beyond a reasonable doubt

- (a) That the witness Miller and the defendant were accomplices in the commission of the crime, and

- (b) That the witness Miller's testimony was corroborated by other evidence which
  - (1) tended to connect the defendant with the commission of the crime, and
  - (2) was of such nature that it more than merely showed
    - (a) the commission of the crime, or
    - (b) the circumstances thereof.

We concede now, in the light of calmer reflection than is engendered by a heated court trial, possibly paragraph three of this Instruction is redundant; probably it is no more than a restatement in a slightly changed form from paragraph two, and vice versa; but, we submit, redundancy itself, when no ambiguity results therefrom, is not error, and, if redundancy existed, it did not justify the trial Court in refusing to give the requested Instruction.

In taking her exception (Tr. 209) to the Court's Instruction No. 6, defendant's counsel called the Court's attention to the Defendant's Requested Instruction No. 6 [3] and also to her Requested Instruction No. 5 which was based upon the law applicable to an alleged agent's declarations and acts binding her alleged principal and which was also refused for the stated reason that it was submitted too late (Tr. 193, 194) and also

Defendant's Requested Instruction No. ...., which the Trial Court also refused but with no stated reason. (Tr. 192).

Defendant's counsel then also stated :

“We feel that that the Court's instruction does not bring out the fact that the statute requires that the corroborated evidence of an accomplice must go further than simply tending to connect the defendant with the commission of the crime. It isn't sufficient if it merely shows the commission of the crime or the circumstances of the commission of the crime, and it seems to us that the Court's language, particularly in lines 8 to 15 on page 7 of Instruction No. 6, does not thoroughly bring out the fact or that statute.” (Tr. 209).

Defendant thus clearly directed the Court's attention to its error in its Instruction No. 6, and also to her own Requested Instruction No. 6, which regardless of whether or not submitted timely under the trial Court's Rule No. 30, correctly and succinctly stated the law under Sections 4263 and 5352, CLA 1933, *supra*.

Furthermore, defendant had previously directed the Court's attention not only to Section 5352, CLA 1933, but also to the necessity thereunder for corroborative evidence of accomplice testimony (Tr. 100, 102), by her motion (Tr. 99-102) made at the close of the government case in chief, which motion was denied (Tr. 102-103). That denial is the basis of Assignment No. XII (Tr. 241-242).



We urget hat the word "may" is used permissively, not prohibitively, in the trial Court's Rule 30; but, in any event, Sections 4263 and 5352, CLA 1933, *supra*, were binding upon the Court regardless of whether defendant called its attention to them timely under that Rule. We maintain that defendant's objection was sufficiently timely; but, even if not, we urge that the entire omission of an instruction under Section 5352, CLA 1933, *supra*, that the jury should view the testimony of the witness Miller with distrust, and the trial Court's misconstruction and ambiguous misstatement of the legal effect of Section 4263, CLA 1933, *supra*, constitute, plain, prejudicial error whereof this Court will notice of its own volition.

This Court has said in regard to a judgment of the same trial Court, viz.:

"The Supreme Court of the United States has never declared the 'manifest error' rule applicable to Alaska. The settled practice in this court has been to exercise an independent judgment with respect to both general and local questions, probably because of the chance of conflicting decisions by the Alaska judges, without other remedy in the courts to avoid the conflict. In view of this settled practice we think we should continue to exercise our independent judgment with respect to appeals from the District Court of the Territory of Alaska, on all questions, whether federal, general or local, until required to 'abdicate' from that practice by a statute or a decision of the Supreme Court of the United States to the contrary. Compare: *White*

*v. United States*, 305 U. S. 281, 292, 59 S. Ct. 179, 83 L. ed. 172.”

*Carscadden v. Territory of Alaska*, 105 F. (2d) 377, 9 Alaska Reports, 514, 527.

We submit that this Court is not bound by the trial Court's rule, and that that rule cannot obligate this Court to not heed an error, to ignore the statutes, to disregard defendant's rights.

Nor do other U. S. Circuit Courts of Appeal seem to hold they are powerless to heed error though not timely objected to.

Judge Sanborn said :

“The contention that proper objections were not made and proper exceptions were not taken, to permit the consideration in this Court of the issues which have been discussed, has not escaped attention; but it fails to convince. *Hall v. U. S.*, 150 U. S. 76, 80, 82, 37 L. ed. 1003; *Waldron v. Waldron*, 156 U. S. 361, 380-383, 39 L. ed. 453.

“And even if it were tenable this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this Court without objection, exception or assignment. *Wiborg v. U. S.*, 163 U. S. 632, 659, 41 L. ed. 289; *August v. U. S.*, 257 Fed. 388, 391, 393.”

*Skuy v. U. S.*, 261 Fed. (8CAA) 316, 320.

Subsequently the District of Columbia Circuit Court of Appeals held:

“Heretofore this Court has noticed error which parties waived by failure to object at the trial in the trial court, to avoid injustice in criminal cases. There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved, and our Rule 17 (i), which states the principle makes no distinction between civil and criminal actions.”

*Shokuwan Shimabukuro v. Higeyashi Nagayama*, 140 F. (2d) 13, at 15.  
See also: *Freed v. U. S.*, 266 Fed. 1012.

In a suit, wherein the liberty of the defendant was not involved but simply the recovery of compensation under a war risk insurance policy, the Fifth Circuit Court of Appeals, on the question of refusal to give an instruction because not presented timely under the local rule, held:

“We think, however, that reversible error was committed in the giving and in the refusal of charges on the issue of permanent disability. Just before the judge gave his charge to the jury, the defendant presented and requested the giving of five special charges. These were refused under Rule 13, a local rule, on the ground that they had been presented too late for adequate consideration. \* \* \* \* \*

“We think the court erred in both giving the charge it did, and in refusing to give the charges defendant asked for. Rule 13, on which the action

is based, is a salutary rule of general application. It is designed to, and it ordinarily will, operate to aid the court in securing a correct submission to the jury. It was not intended to be, it should not be enforced so as to prevent a full and clear submission of defense theories even though not timely presented, when, as here, the charges are few in number and simple in scope and effect."

*United States v. Ellis*, 67 F. (2d) 765, 767.

Subsequently and in 1940 the same court held in a personal injury suit, i.e.:

"Appellee has argued that the plaintiff failed to make its request for instructions within the time contemplated by Rule 51 of the new Rules of Civil Procedure, 28 U.S.C.A. following Section 723c and Rule 18(5) of the local district court. But the request was made before the case was submitted to the jury, and it appears that the court considered the request and ruled upon it, and that Peterson saved exception when the court gave no instruction on the subject of the request. We think that review should not now be refused."

*Peterson v. Sheridan*, 115 F. (2d) 121, 126.

So here, we urge that the trial Court's rule No. 30 should not be so enforced as to deprive defendant of her right to have the jury correctly instructed in accordance with Sections 4263 and 5352, CLA 1933. supra. [2]

[2] App. 2.



(G) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE, NOTWITHSTANDING COURT ITSELF GAVE NO CHARGE ON SUBJECT OF NECESSITY OF PROPER PROOF OF RELATIONSHIP OF AGENT AND PRINCIPAL BETWEEN MILLER AND DEFENDANT.

Defendant by her Requested Instruction No. V asked the trial Court to charge :

“You are instructed that acts or declarations, which were done or made by the witness Margerie Miller and which were claimed to be done or made by her on behalf of the defendant, in any wise connected with the alleged commission of the crime charged in the indictment herein are not to be considered by you in your deliberations unless you find beyond a reasonable doubt from evidence, other than the testimony of said witness Miller, that said witness Miller was the agent of the defendant in doing said acts or making said declarations.

“In other words the witness Miller cannot by her own acts or declarations establish herself to have been the agent of the defendant in the alleged commission of said crime because the relation of agency, if any, between the witness Miller and the defendant must be established by affirmative evidence other than the acts, statements or declarations of the witness Miller.

“You are therefore instructed that regardless of what acts or declarations the witness Miller admitted she did or made in the commission of said crime, you should not find that she did or made any of them as agent of the defendant unless you first find beyond a doubt from other evidence than said witness Miller's testimony, as herein-



above instructed, that said witness Miller then and there was the agent of the defendant." (Tr. 193). This Request is the basis of Assignment No. XXII.

(Tr. 262). It was rejected for the stated reason :

"Presented at 9:55 a.m. Sat. a.m. too late for consideration under our rules. Case finished Friday, 4:30 p.m., and jury instructed Saturday, 10 a.m." (Tr. 193).

Inasmuch as we discuss a similar stated reason of rejection in connection with the rejection of Defendant's Requested Instruction No. VI for a similar stated reason (This brief, pp. 45-54), we do not now reiterate that discussion.

Nowhere in its instructions, did the Court charge the jury in accordance with the principle of this Request.

True, in his Instruction No. V, the Court defined accomplices and quoted Section 5044, CLA 1933, defining principals (Tr. 201, 202); and in its Instruction No. VI, the Court quoted Section 5352, CLA 1933, prescribing the necessity of corroboration of accomplice testimony (Tr. 202, 203).

We contend that both of those two instructions were erroneous; but, we do not here repeat our discussion of those errors because we elsewhere discuss them. (This brief pp. 41-44).

Defendant's Requested Instruction No. V was based upon the well recognized principal, viz.:

"Unless the agency is already apparent or is admitted, or unless the statement has been ratified, the relation of agency between the declarant and the person against whom it is sought to use his admission must be established by affirmative evidence other than the declarations or statements of the alleged agent."

22 CJ 376 Par. 441 (2).

The Request did not ask the Court to charge that the witness Miller's acts and declarations were inadmissible.

The charge requested was succinctly: That Miller by her own acts and declarations could not prove herself to be defendant's agent in the crime's commission. It thus is essentially different from Defendant's Requested Instruction No. VI (Tr. 194), which asked the Court to charge the jury as to the corroboration, necessary to accomplice testimony, before a conviction can be had. Such corroboration is a requirement under Sec. 5352, CLA 1933.

We believe the Request was well within the scope of the decision in

*Shama v. U. S.*, 94 F. (2d) 1, at 5.  
(8 CCA).

We do not understand the language,

“It is well settled that, when on the witness stand, the agent may testify what his principal told him to do, and by such testimony establish the fact of the agency,”

in that decision to mean, and we urge it does not mean, that the agent by the agent's own acts and declarations can establish the fact of the agency. That was all the Request asked, namely: That Miller by her own acts and declarations could not prove herself to be defendant's agent in the crime's commission.

Its essential difference, thus required its giving, in addition to Defendant's Requested Instruction No. VI (Tr. 194), asking the Court to charge as to the corroboration, required by Sec. 5352, CLA 1933, of accomplice testimony, before a conviction could be had.

*State v. Jarvis*, 23 P. (Ore.) 251.

Consistently with this theory Defendant moved (Tr. 66, 67), to strike the witness Miller's testimony at its close, which was denied upon the then stated ground of untimeliness. (Tr. 67). At the close of the government's case, Defendant renewed her motion (Tr. 99, 102), which the Court denied (Tr. 102, 103), and which is the basis of Assignment No. XII, (Tr. 241, 242).

Thus, throughout the trial, defendant maintained she could not be proved to be the principal of the witness Miller by the latter's acts and declarations alone.

(H) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE THAT NO CRIME WOULD BE COMMITTED, BUT ON THE CONTRARY CHARGED THAT A CRIME WOULD BE COMMITTED BY DEFENDANT'S PROMISE OF AGREEMENT WITH MILLER TO PAY OR FURNISH THE MEANS OF TRANSPORTATION OF THE GIRL TO BE TRANSPORTED EVEN THOUGH DEFENDANT DID NOT ACTUALLY PAY OR FURNISH ANY SUCH MEANS OF TRANSPORTATION.

The trial Court refused (Tr. 192) Defendant's Requested Instruction No. ...., reading:

"You are instructed in this case, before you can find the defendant guilty, you must find beyond a reasonable doubt that the defendant did wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, the witness Gloria Virginia Knapp Bowman alias Jean LaRue from Seattle to Sitka.

"And unless you find that the defendant did so transport, caused to be transported, or aid and assist in obtaining transportation for such witness Bowman you must find the defendant not guilty. And you are instructed that to transport or cause to be transported means that the defendant either herself transported or else furnished the means to transport, and that to aid or assist in obtaining transportation means to furnish means which either did or helped to transport such witness Bowman from Seattle to Sitka, and that a promise or agreement by defendant to furnish the means of such transportation, if she did not actually furnish such or any of such means of



transportation, does not constitute the defendant guilty of the crime with which she is charged." (Tr. 192).

This refusal is the basis of Assignment XXI. (Tr. 261, 262.)

The Court in its Instruction No. 6 did charge:

"It is not necessary, however that the defendant be present at the time the arrangements were perfected pursuant to which Jean LaRue came to Sitka, if you believe such arrangements were made, or that the defendant paid her transportation or any part thereof. It is sufficient if she agreed with or directed the witness Marguerite Miller that she, the said Marguerite Miller, should procure a girl or girls for her to be transported in interstate commerce for the purpose of prostitution or other immoral purposes, or agreed to pay such girl's transportation or other expenses in connection therewith, and that pursuant to such agreement or directions that the witness Marguerite Miller procured the girl Jean LaRue to come from Seattle, Washington, to Sitka, Alaska, for the defendant, for the purpose of prostitution or other immoral purposes and that defendant agreed to reimburse or pay the witness Marguerite Miller for said girl's transportation or expenses or any part thereof." (Tr. 202, 203).

Defendant excepted to this charge, viz.:

"We also take exception to the Court's Instruction No. 6. In that connection I call attention to \* \* \* \* the Requested Instruction I handed the Court yesterday. \* \* \* \* We also except to lines 14 to 32 on page 7 of Instruction No. 6, because we



contend that is contrary to the law, that the defendant must have actually done something other than making an agreement or a promise, that she must have either actually caused the transportation or supplied means to aid or help in the transportation, as we tried to set forth in the Requested Instruction 1 we filed with the Court yesterday." (Tr. 209).

This exception is included in Assignment XX. (Tr. 259, at 261).

The Court thus charged diametrically opposite to Defendant's Request.

The Indictment (Tr. 2) is laid under Section 398, USCA Title 18, 36 Stat. 825 (Tr. 197, 198.) It is not a conspiracy statute.

We are not unmindful of the rule,

"Responsibility for crime is not limited under the federal statute to those who do the overt acts. It extends to all who knowingly and wilfully take a hand in it within the act defining a principal."

*Scrader v. U. S.*, 94 F. (2d) 926 (8CCA)

but in that case the defendant was informed the girl lived in Missouri and that procurer was active in procuring the girl, and she endeavored to induce girl to commence prostitution, and pictured the money the girl would make, and apparently in the girl's presence told the procurer "I guess she will be down Friday;" thus actively trying to induce the girl to come from Missouri to Illinois to practice prostitution.

The prostitute had previously worked for defendant, in

*Baish v. U. S.*, 90 F. (2d) 988, 989.

The agreement, if any, did not indicate any interstate commerce was involved. Witness Miller testified:

“She wanted me to get some girls. She was dissatisfied with the girl she had. The girl had been drinking and she thought she wanted some more girls. There was a soldiers’ pay day coming, and I was to go down and make arrangements whereby I could get some girls. She said she would kick what she had out as soon as I got the other girls. \* \* \* She said for me to get them and if they didn’t have the fare to advance it and she would collect and have the money by the time I got back.” (Tr. 25, 26).

Thus, reimbursement of the money was to be made by the girls, not by defendant. Miller repeated that phase of the purported agreement by stating the arrangement, for repayment of the \$70.00 she advanced Gloria Bowman (Jean LaRue) for transportation, cab fare, and spending money, was: “I told her” (LaRue) “to give the money to Maude.” (Tr. 27.) Later, in response to the Court’s questioning, Miller said, she had no interest in Gloria Bowman, the money she advanced Bowman she advanced for defendant under a previous arrangement with her, and that Bowman was to repay it to Maude. (Tr. 30.) Miller, upon her return to Sitka from Seattle, asked defendant, “if she collected my

money from" Gloria Bowman (Tr. 43), and in connection with the alleged settlement between herself and defendant said: "The money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in." (Tr. 44.)

Defendant herself first met Bowman (LaRue) on December 3 or 4, 1941, in Sitka. (Tr. 121.) There is no denial of that fact. Bowman testified, "Down in Seattle I received \$70.00 or close to it from Margie Miller and I was supposed to pay Maude Anderson," (Tr. 88), and that the first time the defendant spoke to her about repaying the \$70.00 was just before Bowman left to move into another house (Tr. 89, 92), but Bowman never repaid the \$70.00 to defendant (Tr. 92), and Miller herself did not claim defendant ever repaid her the money other than by crediting unpaid rent due from her to defendant. (Tr. 44).

We consider it proper to point out this factual evidence in discussing the Court's Instruction No. 6 and Defendant's Requested Instruction No. ...., because of its great difference from the facts which apparently induced the decision in *Schrader v. U. S.*, *supra*.

The evidence herein, in our view, does not show that defendant promised or agreed to repay Miller for the cost of transporting Bowman to Sitka from Seattle or

any other place; but, at the most, under Miller's version, defendant did no more than agree to collect from Bowman such money as Bowman became indebted for to Miller by Miller advancing Bowman the transportation. We submit an agreement to collect a debt, even though the debt is founded upon an immoral consideration, for another is not a crime and could not constitute aid or assistance in the transportation of Bowman for immoral purposes in interstate commerce. Furthermore the act of collecting, if defendant had collected the money, which she did not (Tr. 92), would have occurred after the crime had been accomplished.

Briefly, we submit "the act of collecting," after the commission of the crime, or even the promise to collect from the girl transported the cost of her transportation, could not possibly aid or assist in transporting or obtaining transportation for that girl.

Hence, we urge that Defendant's Requested Instruction No. .... should have been given because it stated a correct premise under the statute, with the violation whereof defendant was charged.

- (I) COURT'S INSTRUCTIONS PLACED BURDEN UPON DEFENDANT TO PROVE SHE WAS NOT AN ACCOMPLICE OF WITNESS MILLER.

In its Instruction No. 5 (Tr. 201, 202), the Trial Court said:



“In the prosecution of this case the Government relies to some extent upon the testimony of Marguerite Miller. *Marguerite Miller is admittedly an accomplice in the crime charged against the defendant.*” (Italics ours).

“ ‘Accomplice’s are defined as all persons who participate in an offense as principals, and ‘principals’ as all persons acting together in the commission of an offense.”

The Court then quoted verbatim Section 5044, CLA 1933, which substantially defines principals as being all persons concerned in the commission of either a felony or misdemeanor whether they directly commit the crime or aid and abet in its commission, though not present, and to be tried and punished as such. The Court then continued:

“You are, therefore, instructed that, if you believe from all the evidence in this case beyond a reasonable doubt that the defendant Maude Anderson was concerned in the commission of the crime charged or aided or abetted in its commission, though not present, and whether she directly committed the act constituting the crime or merely aided or abetted in its commission, though not present, you may find her guilty as a principal.”

Defendant’s objection to this instruction was:

“The defendant takes exception to the Court’s Instruction No. 5, page 6, and calls the Court’s attention to the fact that the language, in the defendant’s opinion, puts a burden upon the defendant as though it was admitted in the case that she is an accomplice whereas



the only admission, by our view, is the admission of Margie Miller that she is an accomplice. I submit the burden is upon the Government to prove that the defendant is an accomplice of Margie Miller." (Tr. 208-209).

In response to this objection, the trial Court made no amendment, correction, amplification or explanation of the language of the Instruction, but simply commented: "I say that Margie Miller has admitted being an accomplice." (Tr. 209).

While defendant concedes that the witness Miller did admit she was an accomplice of the defendant, the witness Miller only and nobody else ever testified that the relation of accompliceship existed between her and the defendant.

The Court readily could have amended its instruction by at most the use of two or three words to inform the jury that what the Court meant was that the witness Miller had admitted that she was an accomplice in the crime charged against the defendant.

But, the Court did nothing of the kind. It let the instruction stand, and in that identical form sent it to the jury.

Under the Alaska law the instructions are taken by the jury with them to the jury-room for their use while considering the evidence and arriving at their verdict.

“When the jury had been completed and sworn the trial shall proceed in the order prescribed in this section unless the court for special reasons otherwise direct.

“ \* \* \* \* \*

“When the evidence is concluded the court shall charge the jury; such charge shall be reduced to writing and read to the jury. Each party shall prepare and submit such instructions as he deems material to the case and the court may hear them upon the propriety of the requested instructions before finally settling the charge that he will give.  
\* \* \* \* \* After the argument shall have been concluded, the jury shall retire to consider the verdict, and shall take with them to the jury room the written charge given them by the court.”

Sec. 3591, CLA 1933.

The jury did so in this action. See first paragraph of trial Court's Instruction No. 11 (Tr. 208).

We submit a vast distinction exists between telling the jury, as the Court did, that “Marguerite Miller is admittedly an accomplice in the crime charged against the defendant” (Tr. 201), and telling the jury, which the Court did not, that “the witness Miller admits she was an accomplice in the crime charged against the defendant.”

Not only was the jury thereby left with the impression, and surely the jury had the right to presume that the Court's language meant, that the relation of accompliceship existed between the witness Miller and the defendant in the commission of the crime charged, stood in the case as an admitted fact concerning which no reasonable doubt existed and in controvention whereof defendant had offered no evidence.

The trial Court emphasized that impression by immediately following its statement, that "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant", with the further language that "Accomplices are defined as persons who participate in any offense as principals, and 'principals' as all persons acting together in the commission of an offense."

No jury could be conceived of such stupidity as would not understand and grasp from that definition that the witness Miller could not be an accomplice of the defendant without the defendant contemporaneously being an accomplice of the witness Miller in the crime charged against the defendant, and that, since the witness Miller is admittedly an accomplice, she is a principal, and that therefore the defendant also was a principal in the commission of the crime.

Nor did the trial Court qualify its language in the subsequent portion of its Instruction No. 5 or in any

other Instruction ; in fact, the remainder of Instruction No. 5, after quoting verbatim Section 5044, CLA 1933, consists of the general language in substance, that if the jury from all the evidence believed beyond a reasonable doubt the defendant was concerned in the commission of the crime or aided or abetted in its commission, though not present, and whether she directly committed the crime or merely aided or abetted in its commission, though not present, the jury might find the defendant guilty as principal (Tr. 202).

The defendant testified:

"Q. She (Miller) testified that during that conversation it was agreed she should go to Seattle and get some girls for you, is that true?" (Tr. 119).

"A. That is not true." (Tr. 120)

"Q. What did Margie Miller say she was going to Seattle for?

"A. Stuff to furnish up that place. Nothing was mentioned about girls. I never had any talk with her about girls at no time." (Tr. 120).

"Q. Did you at any time—I will reframe that—during this conversation, is it true or not that a code was made up between you and Margie Miller, as Margie Miller testified?

"A. Absolutely not.

"Q. No such arrangement was made?

"A. Absolutely not.

"Q. Did you write to Margie Miller about bringing one or more girls or any girls?

"A. Absolutely not.

"Q. To Sitka from Seattle?

"A. Absolutely not.

"Q. Did you have any agreement about her procuring any girls and sending them to you?

"A. Absolutely not." (Tr. 120).

"Q. Had you at any time made arrangements, made any arrangements with Margie Miller with reference to bringing her" (witness Gloria Virginia Knapp Bowman) "to Alaska.

"A. I did not.

"Q. Did you at any time give Margie Miller any money with which to bring this LaRue or Bowman, or any other girl from Seattle?

"A. No, sir.

"Q. Did you ever promise to pay Margie Miller or any one else any money to bring Virginia Bowman or Jean LaRue, or any other girl from Seattle to Sitka, Alaska?

"A. I did not." (Tr. 123).

Further plain, emphatic denials by defendant of her having any part in the crime appear in her testimony. (Tr. 124-131). We will not encumber this brief by repeating them.



We believe no challenge will be made to defendant's contention that the burden was upon the government to prove beyond a reasonable doubt that the defendant was an accomplice of the witness Miller and a principal in the commission of the crime.

We submit that the trial Court by its flat statement that "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant," erroneously removed that burden of proof from the government and placed it upon the defendant.

The witness Miller admitted herself to be an accomplice in the commission of the crime; hence, her testimony was accomplice testimony and subject to the rule of necessary corroboration, but her admission did not remove the burden from the government to prove beyond a reasonable doubt that the defendant was an accomplice of the witness Miller and therefore a principal in the commission of the crime which the witness Miller admitted.

(J) ENTIRE LACK OF INDEPENDENT EVIDENCE, AS REQUIRED BY SECTION 5352, CLA 1933, TO CORROBORATE THE ACCOMPLICE MILLER'S TESTIMONY.

We believe that Assignment No. XVIII (Tr. 255 to 257), which is based upon the Court's denial of Defendant's Motion for a Directed Verdict (Tr. 186 to

191), and Assignment No. XXIV (Tr. 265), which is based upon the error in receiving and filing the verdict of guilty (Tr. 5), and Assignment No. XXV (Tr. 265), which is based upon the Court's denial of Defendant's Motion for Acquittal (Tr. 5), and Assignment No. XXVI (Tr. 265), which is based upon the Court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict (Tr. 6), and Assignment No. XXVII (Tr. 266), which is based upon the Court's denial of Defendant's Motion for a New Trial (Tr. 7), and Assignment No. XXVIII (Tr. 268), which is based upon the erroneous entry of judgment (Tr. 10) against the defendant, can be logically and properly presented together under the above captioned point, because they are all based upon the same fundamental errors.

We propose now to show the defendant's conviction rests upon the testimony of Margie Miller; who was an accomplice, and whose testimony was not corroborated as required by Section 5352, CLA 1933.

Miller's admission of her participation in the alleged commission of the crime made her an accomplice. *State v. Scott*, 42 Pac. 1, ante. She pleaded guilty to the crime charged (Tr. 46, 65). And the trial court instructed the jury that "the witness Marguerite Miller is what is known in law as an accomplice," (Tr. 202).

The witness Miller, on whom the prosecution must rely for defendant's conviction, testified that during and prior to November, 1941, she was practicing her profession as a prostitute at Sitka (Tr. 46); that she was operating the defendant's house of prostitution at Sitka (Tr. 46) "on halves" (Tr. 47, 57); that the defendant agreed to build a place at Sitka so that Miller could have a house of prostitution "of my own" (Tr. 29); that she quit running Maude's house—gave it up—about a week before Miller left for Seattle (Tr. 57); that Miller rented a cabin from Maude (Tr. 57, 58) which Miller retained while she was outside; that Miller left Sitka on a trip to Seattle (Tr. 29) in November, 1941, (Tr. 46); that Miller arranged for furniture for her own house of prostitution (Tr. 58) "linens, bedding, a stove and I think a couple of chairs. She (Maude Anderson) had some furniture in her barn I was going to use" (Tr. 58); that furniture ordered by Miller arrived in Sitka "sometime while I was gone" (Tr. 58); that prior to leaving Sitka for Seattle Miller had "a conversation with Maude Anderson about going to Seattle and procuring some girls for prostitution in Sitka" (Tr. 46); that in Seattle Miller procured Bowman (Jean LaRue), the girl named in the indictment, (Tr. 27) and made arrangements "with her to come up here and to leave on the same boat I went down on"; and advanced her \$70.00 "of my own money" (Tr.

27, 86) for "transportation, cab fare, and some money to have while on the boat, a little bit to spend" (Tr. 27); and "told her to give the money to Maude" (Tr. 27, 30) to pay it back to Maude (Tr. 30); that Bowman "went and bought a ticket, and came back and showed me the ticket" (Tr. 31); that Bowman left on the boat North Coast (Tr. 31); that she went to Sitka and there worked as a prostitute (Tr. 31); that Miller got two other girls in Seattle (Tr. 32, 34, 35); and made arrangements for them to go to Sitka by plane, and advanced them the fare "as I did the other girl" (Tr. 37); "I gave one 140 some dollars and the other 120 some" (Tr. 63) "of my own money" (Tr. 64); that they did not go to Sitka, they got kicked off the boat (Tr. 49).

Miller testified (Tr. 25) that she procured the prostitutes and arranged their transportation for the defendant, by arrangement made with defendant prior to the time she (Miller) left Sitka (Tr. 25, 29); that Miller was to advance the money for the girls' transportation, if the girls didn't have it, and defendant would collect and have the money by the time she (Miller) got back to Sitka (Tr. 26); that they had a code message (Tr. 26, 60) which Miller was to use; that Miller sent defendant a code message advising that the girls had been sent (Tr. 39), that while outside Miller received a letter from defendant (Tr. 42) saying that the Bowman girl showed up but the other two girls did



not show up (Tr. 42) ; and that on account of the war she (Maude Anderson) had decided not to build "on to her mother's home for me" (Tr. 42) ; that she (Miller) destroyed the letter (Tr. 39, 52) "because it could be evidence against Maude and evidence against me" (Tr. 52) ; that Miller returned to Sitka in January, 1942, and went over to defendant's place (Tr. 43) and had a conversation with her (Tr. 43) ; "I asked her if she got my money, if she collected my money from the girl" (Tr. 43) ; that defendant said "No, the girl wouldn't pay it to her" ; that "the girl denied it and wouldn't pay her any money, she said she tried to collect it" (Tr. 43, 44) that defendant objected to paying to Miller the money Miller had advanced but "I convinced her I had it coming to me" (Tr. 51) ; "I had some money coming to me from the girls that were supposed to come by plane and didn't show up, the money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in" (Tr. 44) ; that defendant did not advance Miller any money, and did not repay Miller any money (Tr. 50, 52) ; that all the money for the unlawful transportation was put up by Miller (Tr. 27) ; that "no money, no check, no bank draft of any sort,—no dime of any kind" was given by defendant to Miller to aid or assist in the unlawful transportation (Tr. 50) ; that defendant was not present when the unlawful transportation was arranged by Miller ; and that all the arrangements for girls, and all arrangements for their transportation were made by Miller (Tr. 27).



Such, in substance, was the testimony of the accomplice Miller. It shows that there was no actual transportation of Bowman by either Miller or the defendant. It shows only that money was advanced to aid and assist in obtaining transportation, and that such money was advanced by Miller. It shows that every act and declaration done to procure Bowman to go to Sitka for the purpose of prostitution, and every act and declaration done to furnish Bowman transportation from Seattle to Sitka for such purpose were done and committed by the witness Miller personally. It shows that defendant was not present when such acts and declarations were committed by Miller.

There is nothing whatever in Bowman's testimony, or in any other testimony independent of that of accomplice Miller, that Bowman (or the other two girls) was to repay transportation fare to defendant, either for her or for Miller. Bowman's testimony affirmatively shows that she did not pay defendant the money advanced to Bowman by Miller for transportation (Tr. 92); *but that Bowman did pay "most of it" back to Miller (Tr. 92), and still owes Miller "part of the money", advanced by Miller for Bowman's fare to Sitka.* (Emphasis ours).

The defendant contends that all of Miller's testimony; that she had made arrangements for the defendant to build a place at Sitka so Miller could have a house

of prostitution "of my own" (Tr. 29); Miller's arrangement for furniture for her own house of prostitution (Tr. 58) which arrived at Sitka while Miller was outside (Tr. 59); Miller's procuring girls and arranging for their transportation to Sitka; Miller's testimony that she received a letter from the defendant while she (Miller) was outside on such business to the effect that on account of the war defendant had decided not to build (Tr. 42) the three rooms Miller wanted for her own house of prostitution, IS NOT CONSISTENT with Miller's testimony that she procured the girls and arranged for their transportation to Sitka "for Maude" (Tr. 25). Miller's testimony IS CONSISTENT with defendant's defense, and the theory, that Miller was acting wholly for herself,—to accomplish her own motive and purpose in obtaining and transporting the prostitute Bowman from Seattle to Sitka for Miller's own house of prostitution. And Miller's instructions to Bowman to go to defendant's place on her arrival at Sitka (Tr. 86) IS ENTIRELY CONSISTENT with an intent and purpose on Miller's part to park the prostitute at defendant's place, for Bowman's and Miller's convenience, until Miller's return to Sitka to set up her own house of prostitution. It supports defendant's motion to strike Miller's testimony (Tr. 99) on the ground that there was no relation of principal and agent, or accessory, shown—no conspiracy or agreement between Miller and defendant shown—wherefore Miller's acts and declarations not done or said in the presence of defendant were not admissible in evidence against

the defendant; and that the testimony wholly failed to show that defendant transported, or aided or assisted in transporting, or in furnishing transportation or the means of obtaining transportation for the prostitute Bowman to go from Seattle to Sitka for an immoral purpose.

Miller's testimony IS ALSO CONSISTENT with the kind of testimony to be expected from a conniving, scheming, self-confessed prostitute caught in the toils of the law for violating the White Slave Traffic Act—her hopes and her fears—her motives in minimizing her own guilty acts by implicating defendant, trying to make it appear that Miller was only the agent carrying out the orders of her principal; her hope of benefiting herself—of obtaining some advantage for herself; or to gratify her malice because defendant's failure to build a place for Miller resulted in the defeat of Miller's plans to have her own house of prostitution at Sitka—the kind of testimony which experience in the administration of the criminal law has shown to be so corrupt as to render it unworthy of belief without independent corroboration. *State v. Carr*, 42 Pac. 215.

The defendant denied that she had any agreement with Miller to procure women in Seattle for prostitution in Alaska (Tr. 120); denied that she and Miller had a code (Tr. 120, 124); denied that she had any arrangement with Miller to transport, or furnish transporta-

tion or the means of transportation for, the Bowman woman to Alaska (Tr. 122) ; denied that she told Miller to advance money for fares (Tr. 130) ; denied that she had a conversation with Miller about girls (Tr. 124) ; admitted that she did receive the telegram, Plaintiff's Exhibit 1, from Miller, but said she didn't know what it meant, and did not answer it (Tr. 126, 159) ; denied that she gave Miller credit for rent or anything else for money advanced by Miller (Tr. 129) ; admitted that she agreed to build a place at Sitka and lease it to Miller so Miller could have a place of her own (Tr. 138) for a house of prostitution (Tr. 139) ; alleged that Miller was going to furnish the place and get girls for her own place (Tr. 139) ; that she was going to build three extra bed rooms for Miller (Tr. 140) ; that she didn't have the three bed rooms built because the war broke out (Tr. 141) ; and otherwise denied all of Miller's testimony which tended to show that she was in anywise connected with Miller's unlawful enterprise.

In view of Miller's inconsistent testimony, and the defendant's testimony, it seems fairly evident there was a conflict in the testimony as to whether Miller was an accomplice ; hence, according to the Oregon Supreme Court in *State v. Carr*, 42 Pac. 215, "the issue might have been submitted to the jury under proper instructions of the court."

However that may be, even assuming, but not conceding, that Miller's testimony so clearly made her an accessory or an accomplice of the defendant that the



question became one of law for the court, and that in consequence Miller's acts and declarations not in the presence of the defendant became admissible in evidence against the defendant under the theory that because they were overt acts and declarations done in furtherance of a prior conspiracy or agreement between Miller and defendant to violate the White Slave Traffic Act, the situation still would be governed by Section 5253, CLA 1933, namely:

"No conviction can be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

There is no evidence whatever that the defendant directly committed the act constituting the crime. On the contrary the evidence clearly shows that the witness Miller directly committed the acts constituting the crime charged, and that the defendant Maude Anderson was not present when those acts were committed by Miller.

Section 5044, CLA, 1933, provides:

"That all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."



Therefore, in view of the evidence and this statute the prosecution must show that the defendant aided or abetted in the commission of the crime charged; and, however convincing the government may urge the testimony of the witness Miller to be to show it, a conviction cannot be sustained on Miller's uncorroborated testimony. *State v. Carr*, 42 Pac. 215, ante.

The government realized the principals of law just stated, and called four witnesses other than Margie Miller in an attempt to adduce the required corroboration of Miller's testimony. They were: Oliver T. Mansfield, an FBI agent (Tr. 68); Elvira Cavender, alias Jackie Lugo, a self-confessed prostitute (Tr. 73); Gloria Virginia Knapp Bowman, alias Jean La Rue, also a self-confessed prostitute and the alleged victim in the crime charged (Tr. 85); and Henry Green, a steamship agent (Tr. 95).

The testimony of these four witnesses is the only testimony which the prosecution adduced other than the testimony of Miller the accomplice in an attempt to connect the defendant with the commission of the crime charged. The defendant contends it is not sufficient to connect her with the commission of the crime charged,—that much of it is not “independent altogether of the evidence of the accomplice”; and the rest of it merely shows the commission of the crime or the circumstances

of its commission, which, according to Section 5352, CLA, 1933, is not sufficient for conviction.

Prior to showing what the testimony of these four witnesses was, it seems pertinent to determine what is the material issue in the case—what must be corroborated—for it is clear from the decisions herein cited that “the corroborative evidence must relate to some portion of the testimony which is material to the issue”. *State v. Scott*, 42 Pac. 1, ante.

The one material issue in the case—the gist of the crime charged—is TRANSPORTATION FOR THE IMMORAL PURPOSE.

This court, in the case of *Tedesco v. U. S.*, 118 F. (2d) 737, said:

“The essential elements of an offense under this section are (1) knowingly transporting in interstate commerce a woman (2) for the purpose of prostitution or debauchery or any other immoral purpose.”

In *Caballero v. Hudspeth* (CCA-10) 114 Fed. (2d) 545, the court said:

“The emphasis is upon transportation . . . that the gist of the offense is transportation is indicated by the pronouncement of the Supreme Court in those cases in which it has considered the Act. In *Hoke v. U. S.*, 227 U. S. 308, 320, 33 Sup.

Ct. 281, 283, the court said 'what the Act condemns is transportation obtained or aided, in transportation induced, in interstate commerce, for the immoral purposes mentioned' ”.

In *Mortensen v. U. S.*, 322 U. S. 369, 64 Sup. Ct. 1037, the Supreme Court of the United States said :

“The statute aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purpose. To constitute a violation of the Act it is essential that the interstate transportation have for its object, or be the means of effecting or facilitating the proscribed activities. An intention that the women or girls shall engage in the conduct outlawed by section 2 must be found to exist before the conclusion of the interstate journey, and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. *Without that necessary intention and and motivation immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.* The broad language of the statute is conditioned upon the use of interstate transportation for the purpose of, or as a means of effecting or facilitating the commission of the unlawful act. Whatever their faults, petitioners are entitled to have just and fair treatment under the law, and not to be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress.” (Emphasis ours)

Therefore, in order to sustain the conviction of the defendant under the facts deposed to in this case there must be evidence, independent altogether of the tes-

timony of the accomplice Miller, that Margie Miller advanced money for Bowman's transportation from Seattle to Sitka for the immoral purpose charged "FOR MAUDE", in accordance with a prior arrangement "with Maude" so to do. That is the material issue in this case—that she did it "for Maude", as Miller testified. That is the fact that must be corroborated. The corroborating testimony is therefore not relevant or material or sufficient to sustain defendant's conviction, unless it connects, or tends to connect, her with the material issue of unlawful transportation.

Let us examine the testimony of the four witnesses the Government called to supply the necessary corroboration.

Oliver T. Mansfield testified he was a special agent of the FBI; that on August 31, 1944, at Sitka, he accompanied a deputy marshal who arrested the defendant at her home; that at the time of, and incidental to, the arrest a search was made of the premises "in which she lived" (Tr. 69) "for any evidence that might be connected with this particular case"; that the defendant consented to the search; that in a neighboring room to the room in which the arrest was made a telegram was found. This telegram was identified by the witness Miller as the telegram she sent to the defendant from Seattle. It was dated Seattle, Washington, November 29, 1941, and signed "Marg"; and read: (Tr. 70)



“Airmail two dresses today and send coat on North Coast need the three badly”.

This telegram was received in evidence presumably on the theory that in some way it corroborated the witness Miller and connected the defendant with the commission of the crime charged.

Miller testified (Tr. 26) that

“We had a code message I was to use. Coats and dresses instead of girls, and instead of ‘I am sending’ use the words ‘please send me’, ‘please send me a dress by boat’ that meant a girl was coming by boat. If I said ‘please send me a dress by plane’, that meant a girl was coming by plane; so she would know when to expect the girl.”

If this telegram corroborates anything, it corroborates the defendant’s defense, and the theory hereinbefore expressed, that Miller procured girls in Seattle for herself and for her own house of prostitution at Sitka, and that Miller procured Bowman and furnished her money for transportation to Sitka for Miller’s own house of prostitution; and that it was not done “for Maude”, as Miller testified (Tr. 25, 29).

Miller did not testify, nor did the government ask her, what Miller meant by the last four words in the telegram: “need the three badly.” If, as she testified, the words “coats and dresses” meant “girls” and the



words "boat" and "plane" referred to the way the girls were "coming" to Sitka, what inference could be drawn from the four words "need the three badly" other than that Miller herself needed "the three (girls) badly?" Certainly no inference can be drawn from the words that defendant needed "the three (girls) badly." In fact the phrase contradicts such an interference. Her own construction of its meaning contradicts her own testimony that the other two girls got kicked, not off the plane, but "off the boat." (Tr. 49.)

Furthermore, one glance at this telegram shows that it is neither competent nor sufficient to connect the defendant Maude Anderson with the commission of the crime charged. It is only the testimony of the accomplice Miller corroborating herself with a telegram signed and sent by herself. The authorities heretofore cited clearly hold that the corroborating evidence cannot come from the accomplice; but must be some fact "deposed to independently altogether of the evidence of the accomplice."

*State v. Remolds*, 86 P. (2d) 413, 418.

*State v. Scott*, 42 Pac. 1.

22 CJS 1391, 1397, Sections 812, 810.

16 CJS 698, 701, sections 1426, 1434.

Nevertheless in overruling defendant's motion (Tr. 99-102) to strike Miller's testimony and in overruling defendant's motion (Tr. 186) for a directed verdict, the trial court laid great stress (Tr. 102, 190) on this so called code telegram, Plaintiff's Exhibit 1 (Tr. 70); and it was one of the principal evidentiary facts

which the court held constituted corroboration, and the jury, upon retiring to consider their verdict, took it with them. (Tr. 208).

Elvira Cavender, alias Jackie Lugo, testified (Tr. 73) that she worked as a prostitute at defendant's house from April 16, 1941, to March, 1942, (Tr. 73, 74); that she knew Margie Miller there (Tr. 75); that Margie Miller went outside in 1941 towards Thanksgiving (Tr. 75); that one day she (Lugo) went into defendant's private bedroom, "was only in there for a matter of not more than two minutes"; that Maude Anderson, Margie Miller and the witness were present (Tr. 76):

"I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember—coats or dresses. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram—it meant girls to bring up to Sitka." (Tr. 76).

Objection was made here and Cavender qualified her testimony as follows (Tr. 76, 77, 78):

"Q. Do you know what was meant when they were talking about the Code?

"A. Yes.

“Q. What did they say?

“A. It was girls. I heard the word ‘girls’ mentioned. I heard it.

“Q. Do you recall anything else that was said there or what the discussion was at the time?

“A. No. Just about the exchange of what the telegram was supposed to be about clothes and the girls.

“Q. Was anything said about when it would be sent?

“A. I didn’t hear the time when it should be sent. No, I didn’t.

“Q. At any time in your hearing, at this particular time and place did Maude ask Margie to procure any girls for her?

“A. To me it looked that way.”

The Court: “Never mind that — just state what was said.

“Q. Did she say anything about Margie getting her girls in Seattle that you overheard?

“A. Well, I didn’t hear where she would get girls, but I heard that she would get girls and let her know through the wire in the form of clothes.”

Cavender (Lugo) further testified: That the girl Jean LaRue (Bowman) arrived at Maude’s house around Thanksgiving, after Margie Miller had gone South (Tr. 78); that she (LaRue) “went and had her

examination, which is the general rule of those houses, and come right back to work"; that she worked as a prostitute in defendant's house and stayed there not longer than two months (Tr. 78).

On cross examination Cavender testified: "I heard the conversation and went right out;" that she didn't hear any other talk about Margie getting some girls, between Maude and Margie, except on that occasion, "that is the only time" (Tr. 81); that she didn't see any code written out at that time; that LaRue worked there "in this house, the same house where she (the witness) was working", for about two months, and then left and went to Ruby's house, the same house the witness went to the following March; that she had known Margie Miller "for quite a long time;" that she met her in a house of prostitution in Los Angeles; that she and Margie are pretty close friends, "not too close. I don't correspond with her regularly as I did with her sister, because her sister was taking care of my child."

Cavender also testified (Tr. 84) that she knew at the time that Miller left for the States, after Thanksgiving, 1941, that Miller intended upon her return to establish her own house of prostitution in Sitka, "I believe that Maude was supposed to let her have a house."

Examination of this testimony shows that Cavender overheard part of a conversation between the ac-



complice Miller and the defendant. We can only speculate and guess what the whole conversation was; and we can only speculate and guess from what Cavender heard and related that they were talking about Miller procuring girls "for Maude." The only point in the whole situation is: Did it circumstantially or inferentially have some tendency to connect the defendant with aiding or abetting the accomplice Miller in the commission of the crime charged, namely, the crime of "knowingly transporting and causing to be transported, and aiding and assisting in obtaining transportation for and in transporting" the Bowman girl in interstate commerce, for the purpose of prostitution and for immoral purposes.

Analysis of Cavender's testimony, upon which the prosecution must rely to corroborate Miller's testimony that she was to procure girls at Seattle "for Maude," shows only that Cavender heard the word "girls" mentioned. In answer to the question: "Do you recall anything else that was said there or what the discussion was at the time?" Cavender answered: "No. Just about the exchange of what the telegram was supposed to be about clothes and the girls." (Tr. 77). In answer to the direct question: "At any time in your hearing, at this particular time and place, did Maude ask Margie to procure any girls for her?" she answered "*to me it looked that way.*" (Tr. 77). In answer to the question: "Did she say anything about Margie getting her girls in Seattle that you overheard?" Cavender answered:



“Well, I didn’t hear where she would get the girls, but I heard that she would get the girls and let her know through the wires in the form of clothes.” (Tr. 77, 78).

The defendant contends that Cavender’s testimony wholly fails to show any agreement between the defendant and the accomplice Miller for Miller to procure girls “for Maude” (the defendant); or any fact from which the inference can be drawn that Miller was to procure girls “for Maude.” And that it wholly fails to corroborate the accomplice Miller’s testimony that she procured the girls “for Maude.”

Even more pointedly, it wholly fails to corroborate the accomplice’s testimony as to the essential element of transportation involved in the crime charged. The defendant was not charged with procuring, or aiding or assisting in procuring, girls; and Cavender’s whole testimony is not material or relevant (except the small part of it referring to the fact that the Bowman girl arrived at Sitka and there practiced prostitution—an element, but not the material, or essential, element of the crime charged), because it does not corroborate, or tend to corroborate, circumstantially or otherwise, the essential, or material, element of TRANSPORTATION for the immoral purpose charged.

“The corroborative evidence must relate to some fact or circumstance which is MATERIAL to the issue of the guilt or innocence of the accused;

or, as it has otherwise been expressed, the corroboration must be by proof of substantial facts tending to incriminate the defendant." (Emphasis ours)

16 Corpus Juris, Page 704.

"The rule is that the corroborative evidence must relate to some portion of the testimony which is MATERIAL TO THE ISSUE." (Emphasis ours)

*State v. Scott*, 42 Pac. 1, ante.

And it wholly fails to corroborate, circumstantially or otherwise, the one essential and material point in the accomplice Miller's testimony which must be corroborated in order to sustain the conviction, namely, *that the money which Miller advanced for transportation was advanced "for Maude."*

The testimony is consistent with the defendant's defense, and the theory hereinbefore expressed, that Miller was to procure girls for herself, and not for Maude; and that Miller and Maude were talking about Miller procuring girls for herself, for her own house of prostitution.

Cavender's testimony: "It (the telegram) MEANT girls to bring up to Sitka" \* \* \* telegram or letter whichever she was SUPPOSED to do;" \* \* \* "to me IT LOOKED THAT WAY," represent only the "impressions" of Cavender—how it "looked" to her. But the "impressions" of the witness, or how "it looked" to the witness, is not a

“fact deposed to, independently altogether of the evidence of the accomplice, which taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it.”

*State v. Scott*, 42 Pac. 1, ante.

We have only this “impression” of Cavender that to her it “looked” as if they were talking about Miller procuring girls for Maude. We have only her “impression” as to the whole conversation which she overheard. Her “impressions” should be viewed with suspicion and distrust in the light of her testimony that she was a prostitute; that she met Margie Miller in a house of prostitution in Los Angeles; that she had known Miller “for quite a long time;” that she and Miller “are pretty close friends;” and that Miller’s sister was taking care of the witness’ child, because her “impressions” would naturally be inclined to favor and agree with her friend Miller.

Defendant contends that Cavender’s testimony is incompetent and immaterial, and has no evidentiary value whatever, either to connect the defendant with the commission of the crime charged, or to corroborate the accomplice Miller’s testimony that she (Miller) furnished the money for transportation “for Maude.”

The point of what the prosecution was trying to prove, or corroborate, by such testimony comes and

goes in the mind as the testimony is analyzed; and leaves the "impression" of fleeting shadows that come and go upon the waters. It wholly fails to meet the rule laid down by the Oregon Court in the case of *State vs. Scott*, 42 Pac. 1:

"that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove immaterial matters, which were known to everybody, would have no tendency to conform his testimony involving the guilt of the party on trial . . . . There should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it."

The testimony of Gloria Virginia Knapp Bowman (alias Jean LaRue), the third witness called by the prosecution, does not show a pretty story. Even though everything Bowman did was done knowingly and voluntarily, it damns Margie Miller and the other procurer in Seattle who assisted her in procuring Bowman for the purpose of prostitution. It damns Margie Miller for furnishing her the means of transportation from Seattle to Sitka for the purpose of prostitution. And it damns the defendant for running a house of prostitution at Sitka, and for permitting Bowman to stay there and practice prostitution.

But, the defendant was not charged with running a house of prostitution, or with allowing Bowman to



practice prostitution in her house. The specific charge was that the defendant did

“knowingly transport and cause to be transported, and aid and assist in obtaining transportation for and in transporting”

Bowman from Seattle to Sitka, in interstate commerce, for the purpose of prostitution and for immoral purposes.

Margie Miller’s testimony was that the defendant asked her to get some girls in Seattle for defendant’s house of prostitution at Sitka; that if they didn’t have the fare to advance it; that in accordance with prior arrangements so made with Maude Anderson she (Miller) procured Bowman, and advanced her the fare for transportation to Sitka; and that the girl was transported from Seattle to Sitka for such purpose.

Now, we believe the matter material to the issue in this case—the matter that must be corroborated by independent evidence in order to connect the defendant with the commission of the crime charged — is that Maude Anderson, prior to the commission of the crime, agreed with or requested the accomplice Miller to procure, on behalf of defendant, girls in Seattle for purposes of prostitution at Sitka, and to advance the fare to Sitka if they didn’t have the fare; and that in furtherance thereof Miller procured Bowman to go from Seattle to Sitka for such purpose, and advanced her fare



for transportation to Sitka for such purpose, and that the girl was transported from Seattle to Sitka for such purpose. In other words, that Miller did these things "for Maud (defendant)" in accordance with a prior arrangement made with defendant so to do.

When the matter material to the issue is clearly so defined and limited it is at once apparent that evidence showing that the girl was furnished money by Miller for transportation to Sitka for purposes of prostitution, that she was transported to Sitka for purposes of prostitution, and that at Sitka she practiced prostitution in Maude's house, is not sufficient corroboration; for such evidence merely shows the commission of the crime or the circumstances of the commission. It does not connect, or tend to connect, defendant with the commission of the crime—it does not show that Miller did these things "for Maude," by prior arrangement made with Maude (defendant).

Also when the matter material to the issue is clearly defined and limited, it is at once apparent that all of Bowman's testimony concerning what Miller said and did in Seattle, not being in the presence of the defendant Maude Anderson, amount to no more corroboration of the material issue than they would if Miller had directly said to Bowman, and Bowman had testified thereto, that she (Miller) was not doing these things for herself, but was doing them "for Maude (defendant)." The

reason is, as stated in *State v. Scott*, 42 Pac. 1, that the corroborating evidence cannot come from the accomplice, but must be "some fact deposed to independently altogether of the evidence of the accomplice." Therefore, such testimony as the following given by the witness Bowman, like the telegram heretofore considered, shows that it comes from the accomplice Miller, and is not "independent altogether of the evidence of the accomplice" (Tr. 86):

"Q. What were you going to Sitka for?

"A. To work in a house of prostitution.

"Q. Any particular house?

"A. Yes. Maude Anderson's.

"Q. Upon your arrival in Sitka what did you do?

"A. I went directly to Maude Anderson's."  
(Tr. 86).

This testimony is not relevant or material to connect the defendant with the commission of the crime charged; because the instructions given to Bowman to go to Sitka to work in Maude's house, and to go to Maude's house, were given by Miller, not in defendant's presence. Such testimony is not independent altogether of the accomplice Miller; and is not competent or relevant to connect the defendant with the material

issue of the crime charged. If this were not so, an accomplice could always corroborate himself by telling his story to an independent witness, and then have that witness testify to what the accomplice said or did. In other words, such testimony tends only to show the "commission of the crime or the circumstances of the commission," which, according to Section 5352, CLA 1933, is not sufficient to corroborate the accomplice.

So defined and limited the matter becomes a question of evidence, independent altogether of the accomplice Miller, of what the defendant said or did, if anything—not what Margie Miller said or did—which tends to connect Maude Anderson with the commission of the crime charged.

We have heretofore pointed out that the evidence shows no actual transportation of Bowman by either Miller or the defendant, either by automobile, boat, or otherwise; that no ticket was actually given or furnished, or other arrangement actually made with a transportation company or carrier, by either Miller or the defendant, to transport Bowman from Seattle to Sitka; and that there was no aiding or assisting in the actual transportation otherwise than by furnishing money to buy a ticket for transportation from Seattle to Sitka—and that money was personally furnished by Miller to Bowman, who purchased her own ticket and thereby obtained her own transportation.

Examination of Bowman's testimony thus shows that all of it proves, or tends to prove, if anything, no more than the commission of the crime charged. None of it has any tendency to connect the defendant with the commission of the crime; for it is apparent from all the testimony that she knew nothing whatever of any prior arrangement or agreement between Miller and defendant for Miller to procure girls for prostitution at Sitka "for Maude," or to advance money to girls for transportation to Sitka "for Maude" (defendant).

For these reasons, Bowman's testimony, concerning occurrences PRIOR TO THE TIME SHE ARRIVED AT SITKA and there stepped across the threshold of defendant's house of prostitution, is not relevant or material or of any value whatever to connect defendant with the commission of the crime charged. The matters within her knowledge, and to which she testified, which occurred AFTER SHE ARRIVED AT SITKA are relevant and material, and of value as evidence against defendant, IF THEY CONNECT, OR TEND TO CONNECT, Maude Anderson, directly or inferentially, with the commission of the crime charged.

Bowman's testimony concerning matters within her knowledge which occurred AFTER HER ARRIVAL AT SITKA shows that she arrived at Sitka "the latter part of November — almost December, 1941;" that she went to Maude Anderson's house; that



she didn't see Maude Anderson until about 15 minutes after her arrival at Maude's house (Tr. 92) in Maude's private bedroom; that Maude said : "Are you the girl from the States?" (Tr. 87); that in answer to the question: "Was anything said about whether she was expecting you?" the witness stated her opinion as follows: "She said was I the new girl from the States. That would seem like she was expecting me. I said 'Yes' and she showed me to my room;" that at Maude's direction, the same day Bowman arrived at Sitka, she went to a doctor's for examination, and to the Police Station to report (Tr. 87); that she then went to work—prostitution; that she stayed there "a month. Just a little over maybe;" that she used the name LaRue; that she paid defendant for board and room and "a third of what I made;" that from defendant's she went down to Ruby's house, and from there to the "Middle House"; that she worked at three places in Sitka. In answer to the question (Tr. 89): "Q. At any time did Maude ever mention the money advanced to you for transportation?" she answered, "Yes", and in answer to the question: "Q. And what was it she said about this money?" she answered "She just wanted me to pay her the money back" (Tr. 89); that she left Sitka February 16 or 17, 1942.

On cross examination Bowman testified that the first time defendant spoke about the \$70.00 was when Bowman told her that she was going to move to Ruby's house; that she did not pay the money, or any part of it,



to defendant; that she did pay Margie Miller back "most of it" while Bowman was working at the "Middle House" (Tr. 92); that Bowman made this refund to Margie Miller "in a matter of a few days" after Margie got back to Sitka from Seattle; that she still owes Margie Miller "part of the money" (Tr. 93) advanced to her by Miller; that nothing whatever that defendant might have said induced her to become a prostitute. (Tr. 94).

Such, substantially, is her testimony concerning matters within her knowledge which occurred after her arrival at Sitka. There is not a scintilla of evidence in it to connect the defendant, directly or inferentially, with the commission of the crime charged; that is to say, there is nothing in it to show that the defendant did,

"knowingly transport, or cause to be transported, or aid or assist in obtaining transportation for or in transporting"

Bowman from Seattle to Sitka, in interstate commerce, for the purpose of prostitution; or to corroborate the witness Miller on the material issue of transportation involved in the case.

It merely shows that, by procurement of Margie Miller, with money advanced for transportation by Margie Miller, Bowman voluntarily went from Seattle

to Sitka, and voluntarily practiced prostitution in defendant's house at Sitka. Her testimony does not show that defendant had anything to do, or was in any wise connected, with her transportation to Sitka for such purpose. The only part of her testimony that might even remotely refer to transportation is her statement that just before she left defendant's house to go to Ruby's house defendant "just wanted me to pay her the money back." But she, in fact, testified that she did not pay it back to defendant; but did pay "part of it" back to Margie Miller after Margie got back to Sitka; and that she still owes "part of it" to Margie (Tr. 93). This seems clearly to infer—at least that seems to have been Bowman's understanding — that she owed the money to Margie Miller, and not to defendant; and it is just as logical to infer that defendant, who said or did nothing to insist on payment of the money to her, also recognized the obligation as one owing from Bowman to Margie Miller and was trying to do Miller a favor in her absence, as it is to infer that defendant was trying to collect it for herself. Bowman's payment to Miller, not to defendant, clearly indicates that the obligation was for Bowman to pay Miller, not defendant; and not an obligation for defendant to repay money advanced to Bowman by Miller "for Maude."

Nevertheless, the trial court in denying defendant's motions for a verdict of acquittal (Tr. 103, 190) held that the telegram, plaintiff's Exhibit 1, and the testimony of the witness Bowman were sufficient to

connect the defendant with the commission of the crime charged. The Court said (Tr. 103): "The evidence of this last witness" (Bowman) "alone is enough to take the case to the jury."

The testimony of Henry Green, the fourth and last witness called by the prosecution, merely shows (Tr. 95) that according to the records of his steamship company, "Miss Jean LaRue" was a passenger for Sitka on the SS North Coast, voyage 68, arriving Juneau 12/3/41. It only tends to show, if anything, the commission of the crime charged; and does not in any way even remotely connect, or tend to connect, the defendant with the commission of the crime charged; and does not in any way corroborate, or tend to corroborate, the witness Miller on the material issue of transportation involved in the case.

It follows that the trial Court erred in denying Defendant's motions for directed verdict (Tr. 186-191), for acquittal (Tr. 5), for judgment notwithstanding the verdict (Tr. 6) and for a new trial (Tr. 7) and in receiving and filing the verdict (Tr. 5) and in entering its judgment (Tr. 10), because:

1. There is no evidence whatever in the case, other than that given by the accomplice Margie Miller, that the crime charged was committed by the defendant Maude Anderson;

2. That there was not sufficient evidence to connect the defendant with aiding or abetting

Margie Miller in the commission of the crime charged; and

3. That there was not sufficient evidence of the material issue of transportation involved in the case to corroborate the testimony of the accomplice Margie Miller.

We extended this brief to the foregoing length in the belief that fairness demanded a full analysis of all the evidence to show no necessary corroboration existed therein.

## CONCLUSION

Because of these numerous errors, each of which we urge was of sufficient gravity that its commission denied defendant a fair trial, we submit that a reversal should be granted of the Judgment herein adjudging defendant of having violated the White Slave Traffic Act, namely:

"Same; transportation of woman or girl for immoral purposes, or procuring ticket. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain,



or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding \$5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910 c. 395, No. 2, 36 Stat. 825.)”

Title 18, U.S.C.A. 398.

Respectfully,

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Attorneys for Defendant  
(Appellant.)



## APPENDIX NO. 1

On pages 8 and 17 of this brief reference is made to the prevailing "Taku Wind". We explain what those words mean because apparently no dictionary definition of "Taku Wind" exists. It undoubtedly is comparable to winds which in some places are called "Williwaws". The Juneau station of the U.S. Weather Bureau describes it substantially as a Northeast wind, with quite a little intensity, quite gusty, ranging from 30 to 50 miles an hour, rather cold.

Seemingly near sea level, it apparently blows in all directions at one time, although originating out of the Northeast.

## APPENDIX NO. 2

In addition to her requested instruction No. .... (Tr. 192) which is the basis of her Assignment XXI (Tr. 261, 262) and her requested instruction No. 5 (Tr. 193) which is the basis of her Assignment XXII (Tr. 262, 263) and her requested instruction No. 6 (Tr. 164) which is the basis of her Assignment XXIII (Tr. 263, 264) defendant requested only the following instructions:

## INSTRUCTION NO. 1

If you find from the evidence that the defendant, Maude Anderson, had no knowledge of the transportation of the witness Gloria Virginia Knapp Bowman, alias Jean LaRue, or any intent that she was being, or would be transported for the purpose alleged, it will be your duty to find for the defendant and your verdict should be "not guilty".

*Pine v. U. S.*, 135 F. (2d) 353.

## INSTRUCTION NO. 2

You should acquit the defendant if you do not find her guilty of the charge made in the indictment, even if you find from the evidence that she has been guilty of wrong-doing or of other offenses not charged in the indictment.

*Pine v. U. S.*, 135 F. (2d) 353.

## INSTRUCTION NO. 3

I hereby further instruct you that defendant's intent is a necessary element of the crime with which she is charged, and unless you find beyond a reasonable doubt, from all of the evidence adduced at the trial, that defendant had an intent to commit said crime you should find her not guilty.

*Grayson v. U. S.*, (CAA Ark, 1939) 107 F.  
(2d) 367.

## INSTRUCTION NO. 4

I hereby further instruct you that the testimony of a confessed or proven prostitute is not such as can be relied on to the extent of people with a good reputation and high character.

*Sandquist v. U. S.* (CCA Utah, 1940) 115 F.  
(2d) 510.

## APPENDIX NO. 3

At the bottom of her requested instruction No. 5, defendant cited the authority namely:

22 CJ 376.

At the bottom of her requested instruction No. 6, defendant cited the authorities, namely:

*Freed v. U. S.*, 266 F. 1012,

*Maxey v. U. S.*, 30 App. D. C. 63,

*Thompson vs. U. S.*, 30 App. D. C. 352, 12  
Ann. C.A.S. 1004,

Section 5352, CLA 1933.

Section 4263, CLA 1933.





NO. 11092

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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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MAUDE ANDERSON,	}
<i>Appellant,</i>	
<i>vs.</i>	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	}

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**Appellee's Brief**

*On Appeal From the District Court for the  
Territory of Alaska, Division Number One.*

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and  
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**FILED**

MAY 29 1946

AUL P. O'BRIEN,  
CLERK



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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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MAUDE ANDERSON, <i>Appellant,</i> <i>vs.</i> UNITED STATES OF AMERICA, <i>Appellee.</i>	} NO. 11092
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APPELLEE'S BRIEF

STATEMENT OF FACTS

The appellant was convicted by the verdict of a jury in the District Court for the Territory of Alaska, at Juneau, on April 7, 1945, of violating the White Slave Traffic Act (Act June 25, 1910, C 395, Sec. 2, 36 Stat. 825; 18 U.S.C.A. 398).

Appellant, Maude Anderson, was the owner and operator of a house of prostitution at Sitka, Alaska, and had in her employ as a prostitute one Marguerite Leota Miller. Prior to Miller's departure from Sitka in November, 1941, appellant

requested her to obtain some girls in the States to work for her (Anderson) as prostitutes, and if necessary, to pay the cost of their transportation to Sitka, and that appellant would reimburse her. On Miller's arrival in Seattle, Washington, she induced seventeen-year-old Gloria Virginia Bowman to travel from Seattle to Sitka, Alaska, and furnished her about \$70.00 for her boat ticket. Bowman traveled from Seattle to Sitka immediately thereafter and upon arrival at Sitka reported to appellant and went right to work as a prostitute at appellant's house. Miller also arranged with two other girls in Seattle to go to Sitka as prostitutes and to work for appellant, and advanced them the airplane fare from Seattle to Sitka. Miller thereupon advised appellant by means of a telegraph code message, pre-arranged between the two of them in the presence of a third party, that two girls would be coming to Sitka by airplane and one by steamship. The wording of the telegram which had been previously arranged between Miller and appellant as a means of Miller's informing appellant how many girls the latter might expect from the States was, "Air-mail two dresses today—Send coat on North Coast. Need the three badly." This telegram was found in a bureau drawer in appellant's home at the time of her arrest. Witness Miller was indicted on two counts by a Grand Jury at Juneau, Alaska, for violation of the White Slave Traffic Act, and pleaded guilty to both counts.

The errors assigned in the present case are as follows:

(A) Evidence of transportation of other girls than one named in the indictment and of method of distribu-

tion of prostitution earnings was incompetent and prejudicial.

(B) Abuse of discretion in denying defendant's motion for continuance and in rejecting evidence offered by her to show prosecution witness Miller motivated by spirit of revenge.

(C) Witness Bowman's testimony of agent Miller's acts and declarations, made and done beyond defendant's presence, could not prove existence of agency and were inadmissible.

(D) Accomplice Miller's testimony of contents of letter which she claimed defendant had written to her but which Miller had deliberately destroyed because she deemed it incriminatory was neither corroborative nor admissible.

(E) Telegram, Plaintiff's Exhibit 1, which accomplice Miller testified she sent to defendant, was admitted without proof of having been sent at defendant's request or direction and was not binding on defendant.

(F) Court refused defendant's request to charge on subject of credibility of accomplice Miller's testimony, as required by Section 4263, CLA 1933, and on subject of necessity of accomplice's testimony being corroborated by independent evidence, as required by Section 5352, CLA 1933, and yet its own instructions entirely ignored Section 4263, 4th Subdivision, and misstated and misconstrued requirements of Section 5352.

(G) Court refused defendant's request to charge, notwithstanding Court itself gave no charge on subject of necessity of proper proof of relationship of agent and principal between witness Miller and defendant.

(H) Court refused defendant's request to charge that no crime would be committed, but on the contrary charged that a crime would be committed by defendant's promise or agreement with Miller to pay or furnish the means of transportation of the girl to be transported even though defendant did not actually pay or furnish any such means of transportation.

(I) Court's instructions placed burden upon defendant to prove she was not an accomplice of witness Miller.

(J) Entire lack of independent evidence, as required by Section 5352, CLA 1933, to corroborate the accomplice Miller's testimony.

The plan of this brief is to answer, in the order above listed, the foregoing specifications of errors.

## ISSUES

### I.

#### **Argument Answering Appellant's Specification of Error (A)**

Appellant maintains that admission of evidence of the transportation of other girls than the one named in the indictment and evidence of the method of distribution of prostitution earnings was incompetent and prejudicial.

It is a well established principle of law that evidence of other similar offenses is admissible to show intent. In the past this principle has been liberally applied in cases of violation of the Mann Act. Thus in *Kinser vs. United States* (CCA 8) 231 F. 856, three other prostitutes were permitted to testify



that they acted as prostitutes for defendant; the Court holding, "The admissibility of other transactions showing intent has been fully considered by this Court. *Withaup vs. United States*, 127 Fed. 530, 62 CCA 328; *Olson vs. United States*, 133 Fed. 849, 67 CCA 21; *Exchange Bank et al vs. Moss*, 149 Fed. 340, 79 CCA 278; *Thomas vs. United States*, 156 Fed. 897, 84 CCA 147, 17 LRA (NS) 720; *Schultz vs. United States*, 200 Fed. 234, 118 CCA 420. In view of these authorities it seems entirely a work of supererogation to cite those from elsewhere."

This court has ruled on the exact question at issue in the case of *Tedesco vs. United States* (CCA 9) 118 F. (2d) 737 at 740. In that case, in ruling on the admissibility of evidence to the effect that another girl was similarly transported for prostitution, the Court states, "Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. *Wood vs. United States*, 41 U. S. 342, 360, 16 Pet. 342, 360, 10L Ed. 987 per Mr. Justice Story. This exception has been applied with uniformity down through the years."

Evidence as to the method of distribution of prostitution earnings is competent under this same exception to the rule against admitting evidence of other offenses. Thus in the case of *United States vs. Krulewitch* (CCA 2), 145 F. (2d) 76, Justice Learned Hand states, "The other question is of

the admission of a part of the testimony of one Mary Smith—also a prostitute—who swore that the accused had lived off her earnings while she was so engaged. So far, her testimony was competent upon the issue of his purpose in taking Joyce to Florida, for it fell within the well established doctrine that other instances of similar conduct are competent to prove intent (or purpose) upon the occasion for which the accused is on trial. *Neff vs. United States*, 8 Cir., 105 F. 2d 688; *Cohen vs. United States*, 5 Cir., 120 F. 2d 139.”

In the *Neff* case quoted above the Court states, “Questions as to the admissibility of this class of evidence are within the wise discretion of the trial Court and its rulings as to the same should not be interfered with by a reviewing Court unless it is clear that the questioned evidence has no connection or bearing upon any of the issues involved in the charge.”

In the present case it is impossible to assert that the questioned evidence “has no connection or bearing upon any of the issues involved in the charge” as the intent or purpose in transporting Bowman to Alaska is unquestionably a material matter.

## II.

### **Argument Answering Appellant’s Specification of Error (B)**

Appellant contends that denial of defendant’s motion for continuance by the trial court constituted an abuse of discretion. “The fundamental principle running throughout the subject of continuances is that the granting or refusal of a

continuance rests in the discretion of the Court to which the application is made. Its ruling in reference thereto will not be disturbed by an appellate tribunal unless an abuse of discretion is shown." 12 Am. Jur. 450.

This rule has been upheld by this Court in *Shea vs. United States*, 260 F. 807 in which the leading cases of *Isaacs vs. United States*, 159 U. S. 487, 16 Sup. Ct. 51, and *Crumpton vs. United States*, 138 U. S. 361, 11 Sup. Ct. 355 were quoted, enunciating this doctrine.

In *Hardy vs. United States*, 186 U. S. 224, on appeal from the District of Alaska, 2nd Division, the Supreme Court quoted the *Isaacs* case referred to above and *Golsby vs. United States*, 160 U. S. 70, to the effect "That the action of the trial Court upon an application for continuance is purely a matter of discretion, and not subject to review by this Court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."

There is no clear showing of abuse of discretion by the District Court in denying defendant's motion for continuance in this case. "The rule is practically universal that a continuance will not be granted to enable a party to obtain the testimony of an absent witness unless it appears that the applicant has used due diligence to procure the attendance of such witness. The question as to what constitutes sufficient diligence must be left to the sound discretion of the trial Court." 12 Am. Jur. 469.

Due diligence was not exercised by defendants in this case.

The Government witness and the defendant were present in sufficient time and there was no reason why the witnesses, Lou Dixon Northrup and Irene Holmquist, could not have been present in ample time had due diligence been exercised by the defendant and her attorneys. The indictment in this case was filed on October 24, 1944, and defendant was arrested on November 9, 1944, being released on bond. She was arraigned on March 26, 1945. On the face of the indictment as the first of the three witnesses appearing before the Grand Jury is listed the name, Marguerite Leota Miller, so that it was no surprise that she appeared as a Government witness in the case. Yet at no time from October 24, 1944, until the 4th of April, 1945, was any attempt made to subpoena the two witnesses Northrup and Holmquist in order to show the alleged animus of Miller. It is submitted that far from showing an abuse of discretion in denying the motion for continuance, the Court would have been remiss in its duty had it allowed the continuance with the ensuing costs to the United States Government, in the face of such obvious lack of diligence.

The fact that after the trial was begun defendants did make efforts to obtain the witnesses is of no bearing on the Court's exercise of its discretion. In *Armour & Co. vs. Kollmeyer* (CCA-8) 161 F. 78, 16 LRA (NS) 1110 the Court held that "proof of reasonable but futile diligence to procure the attendance of testimony of a witness about a year before the trial, and for about a week preceeding the trial without evidence of diligence between such dates, is not sufficient grounds for a continuance."

The Court then stated, "But the granting or refusing of a

motion for continuance is entrusted to the judicial discretion of the trial Court, and it is only when the record shows an abuse of that discretion that an Appellate Court will reverse a judgment on account of its exercise. No such abuse appears from this record."

Much greater diligence was exercised in the Kollmeyer case than in the one at Bar, as in the present case no attempt whatsoever was made to subpoena the witnesses until after the case came up for trial.

Even had the defendant exercised due diligence in this case, which obviously she did not, the Court in its discretion was justified in denying the continuance on the grounds that the offer of proof (Tr. 182) clearly shows that the expected testimony of the two witnesses was merely cumulative and impeaching. By these witnesses it was intended to show that the Government witness, Margie Miller, had planned to set up "her own private house of prostitution" in a building which "Maude Anderson was going to do some work on and enlarge" and that Margie Miller had a grudge against "Maude Anderson for not building this house of prostitution."

This evidence is purely cumulative as both Maude Anderson and Clarence Rands had already given in essence the same testimony as that desired to be elicited from Northrup and Holmquist.

Maude Anderson stated (Tr. 118):

"Q. What did she (Margie Miller) say in the con-



versation which took place in your house, in the Lake View Cottage at Sitka?

A. She wanted to lease the place from me and get herself some girls."

And (Tr. 128) "She was mad at me because she didn't get the place next door and she stayed, and when I wanted to build a home, she stayed then until she disposed of the living room set and other things."

And (Tr. 168)

"Q. After Margie Miller returned from the States after her trip of November, 1941, did you and she have any conversation in Sitka about why you hadn't built that house?

A. All I told her was on account of the War breaking out I didn't build and had changed my mind.

Q. What did Margie Miller say?

A. Well, she got pretty mad about it."

Clarence Rands had previously testified to the same effect (Tr. 109, 110).

"Q. Did you and Margie Miller, or she ever make any statement to you against Maude Anderson because of the fact that her arrangements with Maude Anderson about the construction of a building for the use of prostitution was not complied with?

A. Yes, I have.

Q. You did?

A. Yes.

Q. When was it? When was it the conversation took place?

A. I don't recall the exact date. It was after she come back from the south, probably in January or February of the next year. That is when she come back from the States.

Q. Where was Margie Miller living at that time?

A. A little house two doors from the house of prostitution.

Q. What, if anything, did she say in reference to Maude Anderson?

The Court: Exactly what was said in this conversation?

A. Well, Margie was quite peeved and put out because the little house she figured on building wasn't built. I knew there was some riff between Margie—"

Regardless of the question of whether diligence was exercised, it is always within the discretion of the trial court to deny a continuance for the purpose of securing cumulative evidence.

In *Isaacs vs. United States*, 159 U. S. 487, *supra*, as a reason for upholding the denial of a continuance by the trial court, the Supreme Court stated, "In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of defendant himself."

Moreover, even had this testimony not been cumulative, and even had due diligence been exercised, the Court would have

been justified in denying the continuance in its discretion, as the offer of proof clearly shows that the expected testimony is impeaching and serves no other purposes. The object of the testimony was to impeach Margie Miller by showing animus and false statements on her part.

“It is the rule that a continuance is properly refused if the testimony of the absent witness would only tend to impeach a witness of the adverse party.” 12 Am. Jur. 468; Underhill’s Criminal Evidence P. 596; Taylor vs. State 89 Tex. Cr. 112, 229 SW 552.

Thus it is submitted that the trial Court, far from showing abuse, exercised sound discretion in denying the motion for continuance, as due diligence was not shown and as the expected testimony was purely cumulative and impeaching.

### III.

#### **Argument Answering Appellant’s Specification of Error (C)**

Appellant argues that Government witness Bowman’s testimony of agent Miller’s acts and declarations, made and done beyond defendant’s presence, could not prove existence of agency and were inadmissible. She cites the case of Shama vs. United States, 94 F. (2d) Page 1, in an attempt to infer that witness Bowman’s testimony was for the purpose of proving existence of an agency between appellant and witness Miller, while in fact Bowman’s testimony was solely for the purpose of showing the transaction between her and Miller pursuant

to prior arrangements made between appellant and Miller at Sitka, Alaska. The Government does not rely upon witness Bowman's testimony to prove existence of an agency between appellant and Miller. Moreover, the testimony showed an actual conspiracy and the rule is well settled that "Where it appears that two or more persons have conspired to commit an offense, everything said, done, or written by one of them during the existence of the conspiracy, and in the execution or furtherance of the common purpose, is admissible in evidence against the others." 22 C.J.S. Sec. 754; *Holt vs. United States*, 94 F. (2d) 90; *D'Allessandro vs. United States*, 90 F. (2d) 640; *Coplin et al vs. United States*, 88 F. (2d) 652, 57 Sup. Ct. 929; 301 U. S. 703; *Mayola vs. United States*, 71 F. (2d) 65.

And this is so where the acts or declarations are made in the absence of the defendant. In this circuit in *Sugarman vs. United States* (9 Cir.), 35 F. (2d) 663, 665, it is said "—the true rule is that the acts and declarations of one conspirator, in furtherance of the object of the conspiracy and during its existence, are binding on all members of the conspiracy, whether present or absent—." *Ginsberg vs. United States*, (CCA Tex.) 96 F. (2d) 433; *Querica vs. United States*, (CCA Mass.) 70 F. (2d) 997; *Zarate vs. United States*, (CCA Fla.) 41 F. (2d) 598.

Witness Margie Miller was a co-conspirator and hence everything she said in Seattle pursuant to and in furtherance of the conspiracy was admissible against appellant. It is not necessary that the indictment or information should charge

a conspiracy, but, where there is proof of concert of action between two or more persons in commission of an offense, acts and declarations of one are admissible against the other, although no conspiracy has been charged. *Lee Dip vs. United States* (9th Cir.) 92 F. 2d 802 Cert. denied, 58 S. Ct. 526; 303 U. S. 638, 82 L Ed 1099; *Robinson vs. United States*, (CCA 9) 33 F. 2d 238; *Sprinkle et al vs. United States*, (CCA 4) 141 F. 811; *Vilson vs. United States*, (CCA 9) 61 F. 2d 901; *Cossack vs. United States*, (CCA 9) 82 F. 2d 214.

In *Coplin vs. United States*, (CCA 9) 88 F. 2d 652 at Page 660, this Court quoted from *Cossack vs. United States*, supra, as follows:

“When it is established that persons are associated together to accomplish a crime, or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. \* \* \* The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to the common object is, in contemplation of law, the act or declaration of all. \* \* \* 16 C. J. p. 646.”



## IV.

### Argument Answering Appellant's Specification of Error (D)

Since the contents of the letter Miller received from defendant was in pursuance, execution and furtherance of their common purpose it clearly falls within the rules outlined above and the authorities heretofore cited to the effect that everything said, done or written by one co-conspirator during the existence of the conspiracy and in furtherance of the common purpose is admissible in evidence. 22 C.J.S. Sec. 754. In that letter, in referring to the two girls about whom Miller had wired defendant in code, Miller testified that defendant wrote "the two girls hadn't shown up and she didn't know where they were. She was talking about the girls, the houses and that business was bad—."

Also

"Q. Did she state anything in that letter about Gloria Bowman?

A. Yes. She said one girl had arrived by boat but those on the plane didn't." (Tr. 42)

Clearly and unquestionably this writing was in furtherance of the common purpose and made during the existence of the conspiracy, and the rule is settled that secondary evidence is admissible upon proof that the primary evidence cannot be produced, the matter of proof being largely discretionary with the trial Court. Had the letter still been in existence it cannot be disputed that upon proper identification it would be ad-

missible as not only is it a statement of a co-conspirator in furtherance of the common purpose and made during the existence of the conspiracy as stated *supra*, but it also constitutes an admission by the defendant as to material facts. An admission made by a defendant is admissible in evidence regardless of whether it is made after the commission of the offense charged.

The other argument set forth by the appellants, that because the witness Miller had destroyed the letter she should not be permitted to testify as to its contents, is also erroneous. There are numerous cases establishing the rule that one who has destroyed a document may testify as to its contents in the absence of a destruction for the purpose of defrauding the other party. 32 C.J.S. p. 752; *Beem vs. Beem*, 193 Ind. 481, 141 NE 81; *Miller vs. United States*, 21 F. 2d 32, certiorari denied, 276 U. S. 621.

In the Miller case cited, *supra*, contents of a destroyed letter were testified to by a witness who had destroyed it. The Court held: "The receipt of the letter was a mere link in a chain of circumstances and the question as to whether the letter was from Miller or had any connection with him was a question of fact for the jury on the evidence set forth."

In the present case, prudence required that witness Miller destroy the letter in order to protect herself and the other party, the defendant in this case. There is no possible fraudulent motive as would be the case had the document destroyed been the basis for a contractual cause of action. This letter

was of a type which normally would be destroyed and the destruction does not raise an inference of fraud.

The exact question at issue was ruled on in the case of *United States vs. Doebl*, 1 *Baldw.* 519, 520; *Wigmore on Evidence*, 3rd Edition, Vol. IV, P. 354, note 1 where a letter was sent by the defendant to an accomplice. He destroyed it, probably as a precaution. The Court permitted the accomplice to testify as to the contents of the letter.

This case has never been overruled and in light of the general rule in regard to admissibility of secondary evidence of this type it not only is, but rightfully should be, the law. The arguments made by the appellant could well be addressed to the jury as to the weight to be given the evidence but it was not error to permit the jury to consider this testimony along with the other statements made by the witness Miller.

## V.

### **Argument Answering Appellant's Specification of Error (E)**

Appellant contends that the telegram, Plaintiff's Exhibit 1, which accomplice Miller testified she sent to defendant, was admitted "without proof of having been sent at defendant's request or direction." This contention of appellant's is refuted by the very extracts from the transcript of the record quoted in her brief (Appellant's Opening Brief, pages 27 to 31), but the question of whether the telegram was sent at defendant's request is irrelevant as to this specification of error since the exhibit was clearly admissible on other grounds.

It falls within the same general rule discussed *supra* "that where it appears that two or more persons have conspired to commit an offense, everything said, done or written by one of them during the existence of the conspiracy, and in execution or furtherance of the common purpose is admissible in evidence against the other." 22 C.J.S. p. 1288.

This principle was followed in *State vs. Jones*, 20 P. 2d 514, 137 Kan. 514. The syllabus of that case states, "In prosecution for murder, where there was some evidence of conspiracy between defendant and two sons, letters passing between alleged co-conspirators and found in defendant's possession held admissible."

The following cases uphold the rule that letters written by a conspirator in connection with the conspiracy are admissible against a co-conspirator although he was not present when they were written: *Burns vs. United States*, 279 F. 982; *Lewis et al vs. United States*, 38 F. 2d 406; *Nix vs. United States*, 4 F. 2d 652.

In *Browne vs. United States*, 290 F. 870, "A letter written by one alleged conspirator to a co-conspirator, but never received by the latter, was admissible against all conspirators, if it was an act adapted to carry out the conspiracy."

In the present case, there was ample evidence to show that the telegram was adapted to carry out the conspiracy by notifying defendant that the girls had been sent as she had requested.

The telegram in the present case was also properly admitted

into evidence on the ground that it was corroboration of witness Miller's testimony. "Letters and telegrams may be admitted . . . on the grounds that they tend to corroborate other evidence in the case, whether written by a third person or by one party to another." 32 C.J.S. p. 602.

In upholding this rule, the Court stated in *Phillips vs. Catts*, 124 S. 884 at 886, (ALA):

"Appellant suggests the possibility of aiding and abetting a fraud in that ruling of the Court whereby it admitted in evidence over appellant's objection, the letter addressed by plaintiff to Dilworth, the person to whom the coal lands were leased. . . . The letter showed negotiation with Dilworth for a lease. Defendant suggests that it may have been prepared for the occasion of the trial, and so its admission would open a way for the fraud. But any witness may commit perjury. That is always a question for the jury. The Court passes only on questions of competency, relevancy and materiality. There was no error."

In *Tallapoosa County Bank vs. Kreis* (CCA 5) 45 F. 2d 382, the same rule was upheld, the Court stating:

"We are of opinion that the rejected letters were admissible for the purpose of corroborating Gray's testimony. . . . It was error to refuse to admit the letters offered in evidence by appellant."

Appellant's contention in the present case that the telegram was self-saving or in furtherance of a grudge is unsupported



by the evidence as even according to appellant's theory the witness Miller was not given cause to be angry with Maude Anderson until after she learned that Anderson had not built the house for Miller, and the earliest notice to this effect was by Maude Anderson's letter written after the date of this telegram.

Clearly no error was committed by admitting the telegram into evidence as corroboration of witness Miller's testimony and as a document written during the existence of the conspiracy and in furtherance of the common purpose.

## **VI.**

### **Argument Answering Appellant's Specification of Error (F)**

Appellant contends that the Court erred in refusing her request to charge on the subject of the credibility of accomplice Miller's testimony and on subject of the necessity of corroborating an accomplice's testimony, despite the fact that she admits that the time for submission of such requests is governed by the Court's Rule 30 and that appellant's requests were submitted much too late.

Rule 30 states "Instruction to Jury. In every case, civil, or criminal, tried before a jury, the attorney for each side may, as soon as the jury is impanelled, submit to the court copies of such requests for instructions as he desires the court to charge; additional requests may be submitted at any time before the argument on the submission of the case to the jury

is concluded; each request shall be on a separate sheet of paper, and counsel may cite thereunder the authorities supporting each request." (Tr. 195)

The Court in refusing appellant's requests stated, "Presented at 9:55 A. M. Saturday A. M.; too late for consideration under our rules. Case finished Friday, 4:30 P. M. and Jury instructed Saturday, 10:00 A. M." (Tr. 194)

The Court was certainly within its rights in refusing to consider these requests.

"As a general rule a party who desires a particular instruction to be given must request the same within the time fixed by statute or by rule of practice; otherwise a failure or a refusal to give the requested instruction is not error." 23 C.J.S. p. 964.

In *Commonwealth vs. Hassan*, 126 N. E. 287, 235 Mass. 26, the Supreme Judicial Court of Massachusetts upheld the refusal of the trial Court to give requested instructions submitted during argument even though there was no written court rule to that effect.

Among other cases upholding the right of a trial Court to ignore requested instructions submitted too late under the court rule or statute in force, are the following: *McFadden vs. United States* (CCA 3) 165 F. 51; *Flatters vs. State*, 127 N. E. 5, 189 Ind. 287; *State vs. Berryhill*, 177 So. 663, 188 La. 549; *State vs. Townley et al*, 182 N. W. 773, 149 Minn. 5; *Merka vs. State*, 199 S. W. 1123, 82 Tex. Cr. 550; *Commonwealth vs. Sacco*, 156 N. E. 57 (Mass.).

Regardless of the timeliness of the requested instructions it is submitted that the Court's charge in regard to Sec. 5352, C.L.A. 1933 was adequate. The Court quoted the statute (and without becoming involved in the labyrinth of appellant's arguments) and even assuming appellant's statement that the additional words of the Court mean "nothing whatever," it is submitted that the instructions adequately explained the law as to the requirement of corroboration. No juryman could be expected to go through the mental contortions necessary to twist the Court's instruction into a refutation of the clearly expressed words of the statute.

The objection as to the failure to instruct "that the testimony of an accomplice ought to be viewed with distrust" might possibly have had some basis if appellant had made a timely request so to instruct and had she pointed out to the Court at the conclusion of its charge that this subject had been omitted. There is authority, however, even in the face of a properly submitted request for instruction and specific objection and exception to a charge omitting this point, for holding it no error to refuse so to instruct the jury.

In interpreting an identical California statute the Court stated in *People vs. Funtas*, 182 P. 785,

"The Court should have instructed the jury as requested by the defendant to the effect that the testimony of an accomplice is to be viewed with distrust."

But that its failure so to do is not reversible error because—

“An accomplice ordinarily testifies with a view to protecting himself from prosecution, or to concealing his own guilty conduct, or in the hope of earning a reward or gaining a pardon. Such testimony is tainted. But the jury, being presumably men of ordinary understanding, know this; and the Court having to some extent discredited such testimony by instructing the jury, as required by law, that they could not convict the defendant upon the uncorroborated testimony of an accomplice, they would, in following such instruction, closely scrutinize the testimony referred to and naturally and necessarily view it with distrust.”

Appellant admits (Appellant's Opening Brief, P 47 (2) ),

“The defendant well might have been charged with negligence, or perhaps even with misleading the Court had she stood silent throughout the reading of the Court's instructions to the jury without mention that nowhere therein was the jury told ‘to view the testimony of an accomplice with distrust’.”

Yet this is exactly what the defendant did. Care was taken at the conclusion of the Court's charge to specifically point out other objections raised by the defendant to the charge. Mr. Robertson, Attorney for defendant, stated:

“We also take exception to the Court's Instruction No. 6. In that connection I call attention to Defendant's Requested Instruction 5 and 6 and the Requested Instruction I handed the Court yesterday. We feel in that that the Court's instruction does not bring out the fact that the statute requires that

the corroborated evidence of an accomplice must go further than simply tending to connect the defendant with the commission of a crime." Etc. (Tr. 209)

Nowhere was an objection made to the failure to charge in regard to the credibility of an accomplice's testimony. Had it been pointed out to the Court that this statutory instruction had been omitted there is little doubt that the Court would have supplemented his charge to include it. Defendant's silence on this point had the effect of misleading the Court.

Certainly the vague reference to Defendant's requested instructions which the Court had previously properly informed defendant would not be considered, cannot be regarded by any manner of interpretation as having called the Court's attention to the omission.

In *Commonwealth vs. Hassan* (cited *supra* 126 N. E. 287, 235 Mass. 26) the Court stated, "During the argument of the District Attorney Counsel for defendant handed thirteen written requests for instructions to the Clerk of the Court who presented them to the presiding Judge. Counsel for the defendant neither said nor did anything further about the requests until after the charge when he orally called the attention of the Judge to his failure to give requests numbered 4, 7 and 13. The Judge refused to consider them on the ground that they were not seasonably presented. No exception was taken to the charge in any particular, but exception was saved to refusal to grant these three requests—

"In *McMahon vs. O'Connor*, 137 Mass. 216, it was said by Mr. Justice Holmes in 1884 that



‘It is the undoubted right of parties to present requests for rulings, and to have them passed upon. But the right is not infringed by requiring it to be exercised in a reasonable way’—”

In the Hassan case the Supreme Judicial Court of Massachusetts upheld the lower Court’s refusal to consider the requested instructions submitted too late. The Court stated that,

“If at its close substantial omissions or errors are noted in the charge they could be pointed out to the Judge and if he failed to make the necessary corrections or additions exceptions could be had.”

In the case of *McFadden vs. United States* (CCA 3) 165 F. 51, cited *supra*, the Court similarly held that the requests to charge “were presented so late according to the record, that they could not be examined properly, which itself justifies the refusal of them as a whole.”

Appellant quotes three cases interpreting the California statute similar to Sec. 4263 C.L.A. 1933, (Appellant’s Opening Brief, P. 40) in an attempt to show that omission of this charge constitutes error.

An examination of these cases reveals that the Court was properly requested to make the instruction desired in all of them. In *People vs. Bonney*, 33 P. 98, the Court specifically pointed out that “defendant duly excepted.”

In *People vs. Sternberg*, 43 P. 201, the Court was properly

requested to instruct as to the credibility of an accomplice's testimony, and not only refused to give the requested instruction but gave the obviously erroneous one,

“You take up the testimony of the accomplice and judge it as you do the testimony of all others.”

The implied provision of the ruling of the California courts in the three cases cited by appellants is that there would be no error in neglecting to instruct as to the credibility of an accomplice's testimony in the absence of a properly requested instruction and specific exception. This implied ruling is made express by a later case on the subject.

In *People vs. Rose*, 183 P. 874, interpreting the same statute, the California Court stated,

“It follows that failure to give the instruction under the circumstances of this case can hardly be said to be error, inasmuch as the defendant did not request the Court to give it.”

The Oregon Courts interpreting the same provision also hold that it is not error to fail to give the statutory instruction in the absence of a proper request and specific exception taken. The Supreme Court of Oregon stated in the case of *State vs. Edmunson*, 249 P. 1099, 120 Ore. 297,

“Assignment 7 to 14 is based upon the failure of the Court to give the statutory instruction, ‘That the testimony of an accomplice ought to be viewed with distrust’—One of the principal witnesses for the State was the co-defendant of Edmunson.—

“If the Judge’s attention had been called to it he doubtless would have given it. It has recently been held by the Court that in order for the defendant to have availed himself of the error it was necessary for him to have requested the instruction and excepted to the refusal of the Court to give it. *State vs. Keelen et al* 106 Or. 331, 338, 211 P. 924.”

This Court has also held,

“Where no exceptions were taken to the instructions the appellate Court cannot consider assignments of error based on portions of an instruction.” *Vedin vs. U. S.* 4 Alas. Fed. 747, 257 F. 550, certiorari denied 4 Alas. Fed. 813, 40 Sup. Ct. 11, 250 U. S. 663.

Thus in the light of appellant’s failure to seasonably request a charge on the credibility to be given to an accomplice’s testimony, and her neglecting to make a specific exception to this part of the Court’s charge to the Jury, the subject is not a proper one to take up the time of this Court on appeal.

## VII.

### **Argument Answering Appellant’s Specification of Error (G)**

Appellant contends that the Court erred in refusing to give a requested charge in regard to the necessity of proper proof of relationship of agent and principal between Miller and defendant.

For the reasons stated in answering appellant’s specifica-

tion of Error (F) it is submitted that this is not a proper question to be brought before this Court as the request was submitted too late under the rules of the trial court and no specific objection or exception was made in regard to the Court's failure to charge on this subject.

Moreover, defendant's Requested Instruction No. V was irrelevant as the testimony of witness Miller was admissible under the rule discussed supra that everything done or written by one conspirator during the execution or furtherance of the conspiracy is admissible in evidence against the others. As this rule has been discussed at length in connection with appellant's Specification of Error (C) (this brief pp 12 to 14) authorities will not be repeated now.

State vs. Jarvis, 23 P. 251 (Ore.), cited by appellant (appellant's opening brief P. 58) apparently for the proposition that a charge in regard to proof of relationship of principal and agent is necessary in addition to one in regard to the necessity for corroborating the testimony of an accomplice, makes no mention of agency whatever and merely holds that under the statute in effect in Oregon a conviction cannot be sustained upon an accomplice's testimony without corroboration. Thus it apparently has no bearing on this specification of error.

It is further submitted that the requested instruction does not correctly express the law in stating that the "witness Miller cannot by her own acts or declarations establish herself to have been the agent of the defendant." This requested in-

struction arises from a failure to distinguish between statements of an alleged agent testified to by a third party and testimony by the alleged agent on the witness stand as to the facts of agency.

This point was not only clearly ruled on in *Shama vs. United States*, 94 F. 2d 1, at page 5 (CCA 8), but this court upheld the same doctrine in *Nygard vs. Dickinson* 97 F. 2d 53, 57 (CCA 9), a case on appeal from the District Court for the United States for the Territory of Alaska, Division Number One, wherein it stated:

“The declarations of an agent made out of court are inadmissible to prove his agency, but ‘the direct testimony of an agent on the witness stand is admissible to prove his authority and the extent thereof.’ 3 C.J.S. p. 287, Agency Sec. 324, See *Attleboro Mfg. Co. vs. Frankfort Marine, etc. Ins. Co.*, 1 Cir., 240 F. 573, 581; *Handley vs. Johnson* 104 Cal. App. 606, 286 P. 423; *Sierra Paper Co. vs. Mesmer*, 45 Cal. App. 667, 188 P. 605.”

## VIII.

### Argument Answering Appellant's Specification of Error (H)

The basis for this specification of error is appellant's contention that the Court erred in instructing the Jury that “it would be sufficient to show that defendant caused the transportation of Bowman if she agreed with or directed the witness Miller that Miller should procure a girl for the defendant, to be transported in interstate commerce, for the purpose



of prostitution, and that pursuant to such agreement or directions the witness Marguerite Miller procured the girl Jean LaRue to come from Seattle, Washington, to Sitka, Alaska, for defendant for the purpose of prostitution or other immoral purposes, and that defendant agreed to reimburse or pay the witness Marguerite Miller for said girl's transportation or expenses or any part thereof." Appellant argues that in addition it must be shown that the defendant did actually reimburse or pay the witness Miller for the transportation in order for her to be guilty of having "caused" Bowman to be illegally transported. In her requested instruction appellant states "that a promise or agreement by defendant to furnish the means of such transportation, if she did not actually furnish such or any of such means of transportation, does not constitute the defendant guilty of the crime with which she is charged." (Tr. 192) In other words they are in effect saying that if a person directs an accomplice to cause the transportation of a girl and agrees to reimburse the accomplice for the expenses of the girl's transportation and then does the additional wrongful act of refusing to repay the accomplice after the girl has been transported and put to work as a prostitute, the person escapes guilt for "causing" the illegal transportation. Obviously this is fallacious as the question of whether the accomplice is repaid after the transportation has occurred has no bearing on the issue of whether defendant "caused" the girl to be transported.

In the case of *Schrader vs. United States* (CCA 1) 94 F. 2d 927 the defendant had nothing to do with the financing of the transportation and yet was held to have "caused" the girl

to be illegally transported.

In *Harris et al vs. United States*, 114 CCA 406, 194 Fed. 634, affirmed 227 U. S. 340, 33 Sup. Ct. Rep. 289, the Court held that defendant had "caused" the girls to be illegally transported in a case very similar to the one at Bar. In sustaining the conviction of *Harris* the Court held:

"Inasmuch as there was nothing unlawful, under the statute, in receiving these women or advancing the charges on their baggage, conviction must rest on the theory that respondent *Green* went to Charleston and advanced the railroad fare while acting as agent for the respondent *Harris*."

Thus this decision, as well as that of the *Schrader* case, holds that one can cause the illegal transportation of a girl in interstate commerce without advancing the money or even having anything to do with the financing of the transportation of the girl. The Supreme Court affirmed the decision of the *Harris* case on this point.

The Court in its instruction in the case at Bar erred, if at all, in behalf of the defendant by requiring the prosecution to prove that the defendant "agreed to reimburse or pay the witness *Marguerite Miller* for said girl's transportation or expenses or any part thereof" in addition to showing that defendant directed *Miller* to procure the girls for defendant to be transported in interstate commerce for the purpose of prostitution.

## IX.

### Argument Answering Appellant's Specification of Error (I)

Appellant takes exception to the Court's charge that, "Marguerite Miller is admittedly an accomplice in the crime charged against defendant." (Tr. 201), contending that this placed the burden on defendant to prove she was not an accomplice of witness Miller.

The most, however, that can be implied from the Court's instruction on this point is that Miller was an accomplice in the commission of the crime charged. Of whom she is an accomplice is not stated by the Court, nor inferred by it. The question of defendant's complicity is clearly left to the province of the Jury by the subsequent instruction:

"You are, therefore, instructed that, if you believe from all the evidence in this case beyond a reasonable doubt that the defendant Maude Anderson was concerned in the commission of the crime charged or aided or abetted in its commission, though not present, and whether she directly committed the act constituting the crime or merely aided or abetted in its commission, though not present, you may find her guilty as a principal." (Tr. 202)

Thus it is left to the Jury to determine whether the defendant is to be deemed a principal as defined in Sec. 5044, Compiled Laws of Alaska, 1933:

"Principals, who Deemed Such. All persons concerned

in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

Moreover in its later instructions the Court states:

"You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of all the other instructions."—and

"I think, Ladies and Gentlemen, that during the trial I have made no comment on the facts and expressed no opinion in regard thereto; but if I have, or if you think I have, it is your duty to disregard that opinion entirely, or anything I may have said indicating such to you, because the responsibility for the determination of the facts in this case rests upon you and upon you alone, and should be decided by you solely from the evidence submitted in the case." (Tr. 207)

The law is settled that "All of the instructions should be considered together. If, when considered as a whole they state the law correctly and without conflict it is sufficient, although one or more standing alone may be incomplete, may contain inept or ambiguous language, or may state the law incorrectly or without sufficient qualification—As respects criminal cases it is sufficient if the series of instructions considered as a whole, fully and fairly announce the rules of law applicable to the

theory of the prosecution and the defense.” 53 Am. Jur. Sec. 836 PP 612 and 613.

A case closely analogous to the one at Bar, in that exception was taken to a particular sentence of the instruction is that of *Acers vs. United States*, 164 U. S. 388, 17 Sup. Ct. 91, in which the Court stated:

“With reference to the charge in the matter of intent counsel for plaintiff challenge a single sentence, as follows: ‘But you need not go to a thing of that kind, because the law says you may take the act itself as done, and from it you may find that it was wilfully done.’ But this sentence is to be taken, not by itself alone, but in connection with many others, in order to determine what the Court instructed—”

Similarly in the present case when the sentence objected to is taken not by itself alone, but in connection with the rest of the instructions it is clear that the Court’s charge placed the burden of proof on the Government to show “beyond a reasonable doubt that the defendant Maude Anderson was” concerned in the commission of the crime charged as an accomplice or principal.

## **X.**

### **Argument Answering Appellant’s Specification of Error (J)**

Appellant contends there was no independent evidence as required by Section 5352, CLA 1933. to corroborate an accomplice’s testimony. In this connection it is of interest to



note the interpretation given by other courts to statutes identical to Section 5352, CLA 1933. Uniformly the appellate courts take the position that the conviction will be sustained if the corroboration can be held to be sufficient taking the strongest statement of the case against the defendant that the evidence would warrant the jury finding if the facts were specially found. *State v. Estabrook*, 162 Ore. 476, 91 P 2d 838.

Intimate association with the accomplice at about the time of the crime may be sufficient corroboration. *State vs. Brake*, 99 Ore. 310, 195 P 583, and in *State vs. Rosser*, 91 P 2d 295 at 299 the Supreme Court of Oregon stated, "All that the statute requires is that in addition to the testimony of the accomplice or accomplices there be some evidence, however slight, tending to connect the defendant with the commission of the crime."

The California courts have upheld the same interpretation, stating in *People vs. Briley*, 48 P 2d 734, 9 Cal. App. 2d 84, "The corroboration of an accomplice required by Section 1111 need not be such as tends to establish the commission of the offense or to corroborate the precise fact testified to by the accomplice. (Cases cited)

"All that the law requires is that, in addition to the testimony of the accomplice, there be some evidence which, though slight, tends to connect the defendant with the commission of the offense. The testimony of the accomplice, standing alone, is sufficient to establish the commission of the crime charged.

(People vs. Richardson, 161 Cal. 552, 563, 120 P 20, People vs. Snyder, 74 Cal. App. 138, 239 P 705), and the extra judicial declarations of the defendant are sufficient corroboration to sustain a conviction where the effect of such declarations is to tend to connect him with the commission of the crime charged.”

In People vs. Blunkall et al, 161 P 997, 31 Cal. App. 778, the court held: “The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight and entitled, when standing by itself, to little consideration. (See People vs. Melvane, 39 Cal. 616.)

“It is true as is contended that the corroborating testimony in this case consists of circumstantial evidence but the corroboration required by the section named may properly be made by circumstantial as well as by direct evidence.”

In the light of these uniform interpretations of corroboration statutes identical with the one under discussion the corroborating evidence in this case is amply adequate. The facts warranting this conclusion are as follows:

1. The relationship between the witness Miller and defendant would lead to the belief she was acting for Maude Anderson in procuring the girl to be transported illegally. (Tr. 117, Testimony of Maude Anderson)

“Q. What was Margie Miller’s occupation at the time she was conversing with you about leasing the property from you?

A. She was running the place for me at that time, the Lake View Cottage."

Thus the fact that Miller was appellant's agent in running a house of prostitution could be regarded by the jury as a fact corroborating her testimony that she was acting for appellant in procuring the girl illegally transported.

2. The testimony of witness Miller that three girls were sent to Maude Anderson at Anderson's request is corroborated by the fact that defendant had three vacant rooms when the witness Bowman arrived. (Tr. 165, Testimony of Maude Anderson)

"Q. Why did she bring Gloria Bowman into your room to see you, do you know?

A. No. I don't.

Q. Wasn't it because you were actually running that house and expecting Gloria Bowman to come and take that room?

A. There was other rooms besides that. There was other rooms. There were two more empty rooms.

Q. For girls you were expecting by airplane?

A. No.

Q. There were three available rooms?

A. That was Margie's room that she had moved out of."

It certainly is a strange coincidence that three girls were procured and Maude Anderson had facilities to employ the same number of girls.

3. The testimony of Elvira Cavender corroborates the witness Miller's testimony that she was sent to Seattle to procure girls for the defendant and that a code was made up to further this conspiracy. (Tr. p. 76, Testimony of Mrs. Elvira Cavender)

"A. I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember—coats or dresses. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram.

Q. To what were they referring when they were talking about this code?

A. Well, it meant girls to bring up to Sitka."

Thus there is the testimony of another witness to corroborate the accomplice as to the origin of the plot.

4. In addition to this testimony of Mrs. Cavender the telegram itself amply corroborates Miller's testimony. In Paulsen et al vs. United States (9th Cir.) 199 F. 423, in the absence of incriminating testimony by the accomplice one of the principal grounds for the conviction of defendant on a charge of violation of the "White Slave Traffic Act" was the following telegram sent to defendant:

"Seattle, Washington

December 7, 1910

"Nels Paulsen, Burke, Idaho. Wire \$50 at once for violin player. Can you use cornet player? If so, can

get two more A No. 1. I would take him for a while I think. You can get him for three and the violin for three fifty. That will make four. Besides I am going to Everett in the morning for the others. R. is here. Will see her to-morrow morning. Answer in regard to cornet.

“Mrs. Nels Paulsen.”

Evidently the jury was considered a competent judge of what was meant by the wire in that case as the conviction was upheld. There does not even appear to have been any testimony translating the meaning of the telegram in the Paulsen case.

In the present case appellant attempts to infer that this telegram is evidence manufactured by the witness Miller to incriminate the defendant. This cannot be the fact, however, as even by appellant's theory Miller had no grounds for animus against Maude Anderson at the time the wire was sent. The defendant testified (Tr. 159) as to her relationship with Miller at the time the latter went to Seattle as follows:

“A. Yes, we had no arguments.

Q. You were friendly were you not?

A. Yes.”

Furthermore, the defendant's own testimony as to how she regarded the telegram proves itself to be false and leads to the conclusion that she actually knew the wire's meaning. She states (Tr. P 158 & 159)

“Q. Isn't it true, Mrs. Anderson, the reference in the telegram to air mail referred to sending prostitutes up by air plane? Isn't that true?



A. No. I don't remember what that meant.

Q. You don't remember what that meant?

A. I don't know what that telegram meant. I didn't pay any attention to it. I don't know what she meant by that telegram. That is why I didn't bother about it."

It is submitted that this would not be the attitude of a person who receives a mysterious telegram. It would be a matter of great curiosity rather than something to ignore.

5. The witness Bowman's testimony that she took the trip for the purpose of working in a house of prostitution for Maude Anderson corroborates the witness Miller's testimony that she caused the girl to be transported for Maude Anderson. Had Miller been procuring girls to work for herself (Miller) Bowman would not have testified:

"Q. What were you going to Sitka for?

A. To work in a house of prostitution.

Q. Any particular house?

A. Yes. Maude Anderson's."

And on cross examination the following testimony was given (Tr. 93):

Q. Did Margie tell you down there—how long did you talk to Margie in the Atwood Hotel when Billy Day had taken you there?

A. Not more than half an hour.

Q. Did she tell you at that time that a new house was being built for her in Sitka?

A. No.

Q. She didn't mention it at all?

A. She didn't mention it at all.

Q. Did she tell you she wanted you to work for her?

A. No.

Q. You never heard anything of that kind there?

A. No."

This certainly is corroboration of the accomplice Miller's testimony that she procured the girl to be transported for Maude Anderson and this testimony in itself would be sufficient for the Court to leave the question of corroboration to the jury.

Appellant argues that this evidence does not corroborate the witness Miller's testimony because the instructions were given to Bowman by Miller. But independent proof such as this, that Miller did give these instructions, clearly corroborates the accomplice's testimony on the material issue of her procuring the girl to be transported so that she could become a prostitute for Maude Anderson. Miller would not have given those instructions had she been procuring girls for herself.

6. The appellant's conduct at the time of Bowman's arrival in Sitka fully corroborates the accomplice's testimony as to Maude Anderson's complicity in the plot to transport the girl illegally. According to Bowman's testimony (Tr. 87), when she entered Maude Anderson's house appellant asked her if

she was "the girl from the States," indicating clearly that Bowman's arrival was no surprise. But it would have been a surprise had Maude Anderson not been involved in the plot to have the girl illegally transported to Sitka. Appellant's further actions of promptly assigning Bowman to a newly-prepared room, sending her to the doctors and to the Police Department, and putting her to work as a prostitute on the night of her arrival is striking corroboration of the accomplice's testimony that she procured the girl FOR Maude Anderson. It is hard to imagine independent evidence more clearly connecting a defendant with a crime than this actual conduct of Maude Anderson upon the arrival of the girl.

7. The fact that Maude Anderson asked Bowman to repay her the money advanced by the witness Miller for the purpose of furnishing Bowman with means for transportation from Seattle to Alaska corroborates the accomplice's testimony that the \$70.00 was advanced for appellant under a previous agreement and was to be paid back to Maude Anderson.

The witness Bowman stated: "Down in Seattle I received \$70.00 or close to it from Margie Miller and I was supposed to pay Maude Anderson." (Tr. 88), and later: (Tr. 89)

"Q. At any time did Maude ever mention the money advanced to you for transportation?

A. Yes.

Q. When and where was that?

A. Before I left.

Q. About when?

A. Close to the time before I left her.

Q. When did you say? Before you left her house or Sitka?

A. Before I left her house.

Q. Around about that time? A. Yes.

Q. And what was it she said about this money?

A. She just wanted me to pay her the money back.

Q. At the time Maude requested you to pay this money to her, which was advanced for transportation, was Margie Miller back in Sitka at that time? A. No."

The appellant herself testified that Margie Miller never asked her if she had collected the \$70.00 from Gloria Bowman. It is submitted that this inquiry would certainly have been made had the agreement been for the appellant to collect the money for her accomplice. Thus, if Bowman's testimony is to be believed (and that is a question that only the jury which had the opportunity of judging her conduct and demeanor on the stand can decide) the accomplice's testimony that the money was advanced for Maude Anderson to secure the transportation of Bowman to appellant's house of prostitution is corroborated.

In the face of this wealth of independent corroborating evidence appellant attempts to rely on the statement in *State vs. Scott*, 42, P. 1, that "the corroborative evidence must relate to some portion of the testimony which is material to the issue." All of the evidence discussed above is material to the issues involved in this case as to whether Maude Anderson did

cause Gloria Bowman to be transported, or aided or assisted in obtaining transportation for her in interstate or foreign commerce for the purpose of prostitution. This same evidence clearly connects Maude Anderson with the commission of the crime.

In *Harris et al vs. United States*, 114 CCA 406, 194 Fed. 634 affirmed 227 U. S. 340, 33 Sup. Ct. Rep. 289 (cited supra) defendant was convicted on less evidence than the independent evidence corroborating witness Miller in this case, although in the *Harris* case the defendant's agent, Green, denied acting for the defendant. The Court stated: "Inasmuch as there was nothing unlawful, under this statute, in receiving these women or advancing the charges on their baggage, conviction must rest on the theory that respondent Green went to Charleston and advanced the railroad fare while acting as agent for the respondent Harris. This is explicitly denied by respondent Green as a witness. The circumstances that she went away and soon returned with the other women is consistent with the theory of guilt, but it is not seriously inconsistent with the theory that Green acted for herself only. The keeper of such a resort who receives inmates knowing that they have just come from another state and knowing the purpose for which they came and who then advances them money incident to their journey, and who finds that a jury has concluded that she instigated the journey, cannot say that the verdict is without support, because the jury's conclusion is drawn from circumstances which in another environment might not have led to the same inference."



Certainly evidence sufficient in itself to convict a defendant of violating the Mann Act is more than adequate to corroborate an accomplice. In the case at Bar, Miller, like Green, worked for the defendant at a house of prostitution, went away, and returned with a girl for the house. Maude Anderson, like Harris, received the girl and employed her as a prostitute, knowing she had just come from the States and knowing the purpose for which she came. While Harris gave an advance to the girls after their arrival, Anderson attempted to collect an advance previously made to Bowman.

In addition to the evidence on which the conviction was sustained in the Harris Case, in the present case a witness testified to a code having been made by the accomplice and appellant about procuring girls; the telegram resulting therefrom was introduced into evidence; and there is testimony to show there were three girls shipped up and three bedrooms awaiting their arrival at Maude Anderson's house of prostitution.

Thus, in the present case, rather than the mere corroboration required by the statute of "some evidence, however slight, tending to connect the defendant with the commission of the crime" (See *State vs. Rosser* 91 P 2d 295 at 299 cited supra) there is more than enough evidence independent of the testimony of the accomplice Miller to sustain a conviction for violation of the White Slave Traffic Act.

## CONCLUSION

For the foregoing reasons, appellee respectfully submits that no reversible error was committed and that the judgment of the Trial Court ought to be affirmed.

Respectfully submitted,

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